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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

128

ROY A. DICKIE, ASSIGNEE OF WHITAKER & CO., INC., *Petitioner*

v. No. [redacted]

SEWER IMPROVEMENT DISTRICT NO. 1 OF DARDANELLE, ARKANSAS; DAN KEENAN, HAROLD SNYDER, AND LEWIS A. WEBB, SUCCESSOR COMMISSIONERS OF SAID DISTRICT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Roy A. Dickie, Assignee of Whitaker & Co., Inc., petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit, entered in this case on March 2, 1964.

OPINIONS BELOW

The opinion of the District Court is a letter opinion not reported (R. 204) (App. B, infra, p. 4). The opinion of the Supreme Court of Arkansas, referred to in the District Court opinion, is reported at 229 Ark. 697, 318 S. W. 2d 831 (App. B, infra, p. 7). The opinion of the Court of Appeals is reported at 328 F. 2d 296 (App. B, p. 18).

Earlier opinions of the Court of Appeals on aspects of this litigation, relevant but not to be reviewed, are reported at 109 F. 2d 710 (App. C, p. 25) and at 221 F. 2d 649 (App. C, infra, p. 32).

JURISDICTION

The judgment of the court of appeals (App. D, infra, p. 61) was entered on March 2, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

The Federal Court rendered a judgment in 1937 against the respondent sewer district, which was assigned to petitioner, based on bonds issued by the sewer district and a mortgage securing their payment. To enforce the judgment, a Federal Receiver of the affairs and property of the sewer district foreclosed liens in State court (pursuant to authority of the federal court) upon lands delinquent for nonpayment of assessments, the lands being sold to the sewer district at the foreclosure sale in 1941, the landowners having five years from the date of sale to redeem under an applicable state statute, following which, in 1956, the Federal court adjudged that lands unredeemed within that time was not to be permitted to be redeemed and had become assets of the sewer district for liquidation in satisfaction of the Federal judgment rendered in 1937. In 1959 the Supreme Court of Arkansas construed and applied a state redemption statute in such a way as to permit the former landowners, over 16 years after the foreclosure sale, to redeem the lands (heretofore sold to the sewer district for the benefit of petitioner and to enforce the Federal judgment). In 1960 the Federal court gave full faith and credit to the State court decision and denied petitioner writs of execution and other relief against the lands and sewer district involved.

Questions presented are:

1. Whether the State court decision and application of a five-year state redemption statute (to permit redemption over 16 years following sale of the lands involved) was unlawfully given full faith and credit in this Federal proceeding.

2. Whether the application of the redemption statute in such manner and giving full faith and credit to the state court decision deprived petitioner of property rights without due process of law in violation of Amendment 14 and Amendment 5 of the Constitution of the United States.

3. Whether the application of the redemption statute in such manner impaired the obligation of a contract in violation of Article I, Section 10, of the Constitution of the United States.

4. Whether the adjudication of the Federal court in 1956 that the lands involved were not subject to redemption and had become assets of the sewer district (for satisfaction of petitioner's judgment) was conclusive of that issue and not subject to being superseded and interfered with by the subsequent State court decision to the contrary and by the Federal court's then giving controlling effect to the State court decision.

5. In the Federal proceeding was it error to apply a 1958 and 1959 construction of a state law by the State court rather than the construction in effect at the time rights in the land became vested in the sewer district and petitioner.

6. Whether the State court decision constituted unlawful interference with Federal jurisdiction over the property and subject matter.

7. Whether the Federal court erred in denying writs of execution against the lands claimed to have become

vested in the sewer district and denying alternative relief to the end of fulfilling and enforcing federal judgments and mandatory orders theretofore rendered in the federal proceeding.

STATUTES INVOLVED

Statutes and provisions of the Constitution of the United States involved are the following, which are printed in Appendix A, infra, p. 1:

Arkansas statutes: Kirby & Castle Digest of the Arkansas Statutes (1916): Sections 6873 and 6874 (Act 43 of February 9, 1915, Section 1) and Section 6903 (Act 84 of March 22, 1881); Arkansas Statutes 1947 Annotated, Vol. 2B, Sections 20-444 and 20-445 (Act 207 of 1937, Sections 4 and 5) and Section 20-446.1 (Act 195 of 1949, Section 21).

(The sewer district involved in the action was organized under Kirby's Digest of the Statutes of Arkansas (1911), Sections 5664 to 5742. (Act 84 of March 22, 1881), as amended to the time of its organization in 1917, and the statutes cited in the foregoing paragraphs, appended hereto, are provisions deemed directly involved, together with provisions of Arkansas statutes which were enacted after the sewer district was formed and the bonds and mortgage referred to herein were issued).

Federal statutes: 28 U. S. C. Section 1738, Act June 25, 1948, C. 646, 62 Stat. 947. (Full faith and credit clause).

Constitutional provisions: Article 1, Section 10 (impairment of contract clause); Amendment 5 (due process of law clause); Amendment 14 (due process of law and equal protection clauses).

STATEMENT OF THE CASE

In 1917, the respondent sewer district issued $32,500.00 of bearer bonds to finance construction of a sewer improvement, mortgaging the assessed benefits on property in the sewer district to secure payment of the bonds (R. 5, 16).

The sewer district defaulted in payment of the bonds, and, in 1936, Whitaker & Co., Inc., on behalf of the bondholders brought this action in the Federal Court, jurisdiction being based on diversity of citizenship, plaintiff being a citizen of Missouri and defendants being citizens of Arkansas (R. 4).

On October 1, 1937, the Federal Court rendered judgment for Whitaker & Co., Inc. against the sewer district ($28,074.01, plus costs), the amount being later enlarged by supplemental decree in 1939 by an additional $2,762.20, the whole bearing interest at 6% per annum (R. 19, 25).

A Receiver was appointed by the Federal Court to take over the affairs of the district and to collect the unpaid assessments on property in the district and apply the proceeds to the Federal judgment (R. 21, 97), and to that end, the Federal Receiver sued in the State Court (Chancery Court of Yell County, Arkansas) in 1939 to foreclose the sewer district's liens for delinquent assessments against lands in the sewer district for the purpose of fulfilling and satisfying the Federal Court judgment.

In 1940, it was determined by the Court of Appeals for the Eighth Circuit, in this Federal Court proceeding, that Whitaker & Co., Inc. held first lien on the uncollected assessments of the sewer district, the lien being established by the final judgment of the Federal Court in 1937, supra. (*Whitaker & Co.* v. *Grable*, 109 F. 2d 710; App. C, infra, p. 25).

The Federal Receiver proceeded in the State Court with the foreclosure suit, and, in 1941, the State Court ren-

dered foreclosure decree and ordered the delinquent lands sold at foreclosure sale, which was held on December 1, 1941, at which the sewer district became the purchaser of a number of parcels of the land (R. 88 and 109). The sale of lands to the sewer district was confirmed and approved by the State Court on December 16, 1941, and it was ordered by the State Court that deeds be issued to the sewer district on expiration of the statutory period of redemption (R. 109). The period allowed land owners for redemption was 5 years from the date of foreclosure sale and the period expired December 1, 1946 (R. 95, 96; Kirby & Castle Digest of the Statutes of Arkansas, Section 6874, Act 43 of 1915 of Arkansas, Section 1, App. A, infra, p. 1).

During the following years, the proceedings in the Federal Court in this action, and the proceedings incident thereto in the State Court, have been to the end of enforcing and satisfying the federal judgment rendered in 1937 and 1939 (R. 19, 25), which, by assignment from Whitaker & Co., Inc. to Petitioner here, became the property of Petitioner (R. 26). During the years, some collections of assessments were made on some properties situated within the improvement district, and proceeds were applied against the federal judgment; but the amounts were small and the judgment balance (with interest accruing) now and still amounts to over $55,000.00 (R. 46A).

After the period allowed for land owners to redeem property from the State Court foreclosure sale had expired, the deeds which the State Court had ordered issued to the district were in fact not issued to the sewer district; various commissioners of the sewer district died and resigned (R. 59); other Federal Receivers were appointed, in succession; and the sewer district did not take actual possession of the lands which it had purchased at the foreclosure sale and which remained unredeemed, although efforts to the end of establishing the sewer district's owner-

ship, for the benefit of Petitioner here in enforcement and satisfaction of Petitioner's Federal Court judgment have continued to be made and judgments relating to the lands and Petitioner's rights have been rendered both in State Courts and in the Federal Court, the effect of which will be before this Court if this petition for writ of certiorari is granted.

In January and March, 1956, by two orders (R. 90 and 96), the Federal Court adjudged that the period for redemption of the lands which had been sold to the sewer district (for the benefit of Petitioner) at the foreclosure sale in State Court in 1941 had expired on December 1, 1946, and that the lands remaining unredeemed within the period from the date of sale to December 1, 1946, were assets of the sewer district, for the benefit of Petitioner, and that redemption of lands by the former landowners was not to be allowed by the Federal Receiver in charge of the affairs and property of the district, where the period for redemption had expired as stated (R. 90 and 96, App. D, infra, p. 48, 49). At that time the parties to this action also stipulated that the period of redemption expired on December 1, 1946 (R. 95).

This was a Federal Court decision on the merits in this diversity suit, which became final and from which no appeal has been taken.

Subsequently, for the first time, the Federal Court's attention was called to another statute of Arkansas which purported to prohibit the appointment of Receivers for improvement districts generally, and the Federal Court, by order rendered September 24, 1956, substituted the commissioners of the sewer district for the Federal Receiver, ordering them to proceed to do what the Receiver had been ordered to do, to liquidate the assets of the sewer district and apply them toward satisfaction of the Federal judgment, at the same time adjudging that all past acts of the

Federal Receiver were valid and effective (R. 143, 146, 147).

On December 12, 1956, the Federal Court ordered the commissioners of the sewer district to obtain from the State Court a determination as to the validity of the 1941 foreclosure sale in State Court, since the Federal Receiver had brought the foreclosure proceedings in the State Court (by authority of the Federal Court) instead of commissioners of the sewer district (R. 157-159).

Shortly thereafter, the United States District Judge, who had presided over the litigation in Federal Court from the beginning, Judge Thomas C. Trimble, became inactive as United States District Judge, his last participation in this litigation having been in May, 1957 on a matter not pertinent here (R. 165).

Pursuant to Judge Trimble's prior orders, the commissioners of the sewer district were then in process of obtaining a determination in the State Court on the validity of the foreclosure sale in the suit brought years earlier by the Federal Receiver (R. 108). A claimed land owner intervened in the State Court proceeding (R. 111) and Petitioner also intervened in the proceeding (R. 181). The State Court proceeding was underway when Judge Trimble became inactive.

The State Court rendered a decision on March 17, 1958 that the 1941 foreclosure sale in the suit brought by the Federal Receiver was valid and effective. It ruled further that the federal receivership was also valid and that all acts of the Federal Receiver were effective (as the Federal Court had earlier ruled, supra [R. 143, 146, 147], but the State Court proceeded beyond those matters in its decision and decided also (contrary to the Federal Court's earlier decision on the point) that the former land owners could redeem their lands from the foreclosure sale over 16 years

after the sale of the lands to the sewer district which had been held in 1941 for the purpose of liquidation and satisfaction of the federal judgment in this action. The State Court decision was appealed to the Supreme Court of Arkansas, which affirmed, holding that the federal receivership and all acts of the Receiver and the foreclosure sale in 1941 in State Court were valid and effective, but holding further, on general principles of equity, that the former land owners could, over 16 years later redeem their land from the foreclosure sale, notwithstanding expiration of the statutory period of redemption. *Whitaker & Company, et al, v. Sewer Improvement District No. 1 of Dardanelle, Arkansas*, 229 Ark. 697, 318 S. W. 2d 831, App. B, infra, p. 7).

This State Court decision is in direct conflict with the earlier, final adjudication of the Federal Court in this federal action on the same point (R. 96), which held that redemption was not to be allowed after December 1, 1946 and that to allow such redemption would impair assets of the sewer district and rights of Petitioner therein. Further, Petitioner urges that the State Court decision was in direct conflict with the decisions of the Supreme Court of Arkansas itself up to that time, the earlier decisions of which Court had construed and applied redemption statutes in such manner as to limit redemption to the period provided by statute.

The decision of the Supreme Court of Arkansas was in the year 1959. Petitioner here then filed in the Federal Court, in this action, a Petition for Review of The Case and For Rule on Defendant to Show Cause, referring to the decisions of the Arkansas Trial and Appellate Courts, the mandatory orders of the Federal Court which had not been fulfilled toward liquidation of the assets of the sewer district and application of same toward satisfaction of the federal judgment, and praying that the commissioners of

the sewer district be compelled to present a plan for liquidation of the judgment or, in the alternative to award Petitioner writs of execution against the lands purchased by the sewer district at the 1941 foreclosure sale which had been held valid, and praying for such other relief as may be necessary and proper to bring the case to termination (R. 176-190).

The commissioners of the sewer district answered in the Federal Court action (R. 191), it appearing from the answer that all but one of the former land owners had redeemed lands from the foreclosure sale pursuant to the State Court decision permitting redemption of lands over 16 years after the sale, the relief prayed being dismissal of Petitioner's Petition for Review (R. 191). The United States District Judge, J. Smith Henley, then recently appointed Judge, succeeding to the position of Judge Thomas C. Trimble, then rendered the order in this action (denying the Petition for Review) of which review, basically, is sought (R. 207), which became final and appealable by virtue of the final orders of Judge Henley closing the case (R. 225-232).

In the Federal Court's memorandum letter opinion rendered in connection with this order, the Federal Court held that the recent Sate Court decision on redemption, and application of the 5 year redemption statute, in such way as to permit redemption over 16 years after the foreclosure sale, were to be given effect in the federal case (noting that even the one land owner who was not shown to have redeemed land may have by then done so), necessarily holding that the state statute purporting to allow redemption of land from the foreclosure sale only until December 1, 1946, was to be applied in this particular federal action to permit redemption over 16 years later (R. 204, App. B, infra, p. 4). This decision and application of the state statute in the Federal Court action, by Judge

Henley, was in direct conflict with the decision of the same Federal Court, under Judge Trimble. Judge Henley held that the State Court decision in 1958 (affirmed by the Supreme Court of Arkansas in 1959) was to be given full faith and credit in the Federal action.

The Court of Appeals affirmed Judge Henley, by the judgment on May 2, 1964, of which review is here sought. (Appended at end of printed record, p. 9 of appended portion; App. D, infra p. 61). In its opinion, the Court of Appeals held that the State Court decision was to be given full faith and credit in the Federal case and that construction and application of the 5 year redemption statute in such manner as to permit redemption over 16 years after the sale of the lands to the sewer district, in derogation of Petitioner's liens and rights, arising by virtue of the Federal judgment, in the assets of the sewer district, was not an unconstitutional deprivation of Petitioner's rights and did not deprive him of property without due process of law, in violation of the due process clauses of the 5th and 14th amendments to the Constitution of the United States; and the Court of Appeals stated further that Petitioner had not, further, been unconstitutionally deprived of equal protection of the laws under the 14th amendment.

The practical effect of the decision of which review is sought is to make the Federal judgment held by Petitioner uncollectible. In an earlier decision of the Court of Appeals in this same proceeding, it has already been decided that no additional assessments can be levied on lands in the sewer district in order to pay the Federal judgment (based on bonds which financed the sewer system for the lands). *Whitaker & Co.* v. *Sewer Improvement No. 1*, 221 Fed. 649; App. C, infra, p. 32.

REASONS FOR GRANTING THE WRIT

1. A substantial part of all public improvements in the United States, such as roads, utility systems and

bridges, have been and are being constructed by local improvement districts, which finance the costs by issuance of bonds secured by lien on assessments against lands benefitted by the improvements. Decisions and applications of state and federal laws in such manner as, in fact, to defeat payment of the bonds and judgments based thereon are clearly important to the country and affect the public at large. This widespread method of financing public improvements would be seriously affected if, by such decisions, the public invited to lend money to districts by purchase of bonds become uncertain as to their rights to enforce payment of the bonds. The decisions below had the effect of defeating payment of such bonds with the result (in effect) that the sewer district and lands within it acquired and constructed and have used for over 40 years, a public improvement, benefitting them directly, at the expense of the bondholders who financed the improvement, to whose rights petitioner succeeded.

2. This case is important in respect to the relation between the Federal courts and State courts and administration of justice in the two separate judicial systems, and the decisions below are believed to be in conflict with principles established by this Court and applicable decisions of this Court.

This case presents the unusual circumstance in which a Federal adjudication in 1956 was not given any effect whatever in a later State court proceeding, the State court decision being in direct conflict with the earlier Federal decision, and in which, notwithstanding the conflict, the Federal court (when presided over by a different judge than the judge rendering the 1956 decision) gave full faith and credit to the State court decision and application of state law. 28 U. S. C. Sect. 1738, 62 Stat. 947 is directly involved.

The Federal Court, since 1937, had jurisdiction of the litigation and of all property of the sewer district; it had rendered judgment in favor of the bondholders, (now petitioner), had appointed receiver and had taken control over the district's property and affairs and the liquidation of its assets (R. 19, 25). It had ordered liquidation of the assets of the district in 1956 and it had adjudged that the lands involved in this action had become assets of the district to be liquidated toward satisfaction of its judgment rendered in 1937. It had adjudged in 1956 that the lands which had not been redeemed by December 1, 1946, could not thereafter be redeemed. The later State court proceeding nevertheless applied the five-year redemption statute in such way as to permit redemption over 16 years after sale of the lands.

By giving full faith and credit to the State court decision, permitting former landowners to redeem the lands and thus make them no longer assets of the sewer district, the courts below abdicated Federal jurisdiction over the case and rendered decisions in conflict with the principles enunciated by this court in *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226; *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 56 S. Ct. 343, 80 L. Ed. 331.

The State court decision, when given effect by the courts below, effectively relieved the sewer district from paying a judgment which had already been recovered in the Federal court and superseded a Federal adjudication on the issue of right of redemption of land which had been rendered previously in the Federal action. This interference with Federal jurisdiction and Federal control over the property involved was unlawful and emasculated the jurisdiction of the Federal court contrary to the principles established by this Court. *Riggs* v. *Johnson County Supervisors*, 73 U. S. 166, 6 Wall. 166, 18 L. Ed. 768; *Supervisors* v. *Durant*, (*Board of Supervisors of the County of Wash-*

ington v. *United States*), 76 U. S. 415, 9 Wall. 415, 19 L. Ed. 732.

If the State court proceeding could thus interfere with the Federal proceedings, Federal jurisdiction is a myth. It is at the mercy of state tribunals. (*Supervisors* v. *Durant, supra.*)

The State court decision erroneously did not, itself, give full faith and credit to the prior adjudication of the federal court in 1956 (to the effect that the unredeemed lands were assets of the district to be liquidated toward satisfaction of petitioner's judgment). That this Federal decision was entitled to full faith and credit in the State proceeding seems clear. *Hancock National Bank* v. *Farnum*, 176 U. S. 640, 20 S. Ct. 506, 44 L. Ed. 619; *Stoll* v. *Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104. This rule was enunciated unequivocally in *Kersh Lake Drainage District* v. *Johnson*, 309 U. S. 485, 60 S. Ct. 640, 84 L. Ed. 881. In that case this Court found that the State court had given full faith and credit to a prior Federal decision, but left no doubt but that the requirement in fact there fulfilled was a requirement of law. In the State court decision, incorporated into the present Federal action, the requirement was not fulfilled.

Further the courts below erred in giving full faith and credit to the state court decision against the claim that the state court decision and the application of the redemption statute to permit redemption after the redemption period expired were constitutionally void, as Petitioner will urge here. If the state court decision and application of state law were constitutionally void the full faith and credit to them should not have been given. *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345; *Griffin* v. *Griffin*, 327 U. S. 220, 66 S. Ct. 556, 90 L. Ed. 635.

3. The courts below erroneously determined an important State question in a way in conflict with applicable state law. The applicable state law was that in effect at the time the rights of the parties were created and established—the issuance of bonds and mortgage in 1917 and the state foreclosure sale in 1941 at direction of the Federal court, rather than a 1959 construction of the state law, created long after petitioner's rights had become vested.

Further, this being a Federal action with jurisdiction based on diversity of citizenship, the courts below, in the exercise of Federal jurisdiction, erroneously determined that the construction placed on a five-year redemption statute in 1958 and 1959 by State courts was to be applied in the Federal action, rather than the state laws as construed and applied when petitioner's rights were established. *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 44 S. Ct. 197, 68 L. Ed. 382; *Gelpcke* v. *Dubuque,* 68 U. S. 175, 1 Wall. 175, 17 L. Ed. 520.

Under applicable state law, ownership of the lands had vested in the sewer district for the benefit of petitioner and were assets of the sewer district to be liquidated and applied to satisfaction of petitioner's judgment, and the former landowners' right to redeem from the 1941 foreclosure sale had expired December 1, 1946.

The Federal Court had so adjudged in 1956 in this proceeding. The law of Arkansas applicable at the time of the Federal court decision and at the earlier times of the vesting of petitioner's rights was that the *ownership* of the lands had vested in the sewer district. In *Baur* v. *Gwaltney,* 191 Ark. 1030, 88 S. W. 2d 1005, (1935), the Supreme Court of Arkansas held that when land is legally sold to an improvement district, and the period of redemption has expired as provided by law, the title thereto "*becomes absolutely vested*" in the district, which rights the

legislature is without power to take away. The decision in that case was that a statute enlarging redemption time, after the redemption period under prior law has expired, is unconstitutional and void because it disturbs vested rights in property. The law was the same at the time the bonds and mortgage which furnished the basis for this action were issued, when the contract and property rights involved were created. In *Brasch* v. *Mumcy*, 99 Ark. 325, 138 S. W. 458, (1911), the Arkansas Court's holding was, in respect to property rights acquired by foreclosure sales: "After the Commissioner's sale is confirmed, the rights of the purchaser relate back to the date of the same made by him, and the purchaser is then considered *the owner* from and after that date." In the same case, the Court held that the right of redemption of former landowners is only statutory and must be asserted in the time and manner named in the statute creating the right, and that courts cannot by construction extend the time or vary the terms of the statute under which such right can be exercised. The Court held that subsequent proceedings, such as confirmation of the sale, only gives the court's sanction to *something that has already taken place* (the sale and passage of title) and authorizes the commissioner to execute the deed. *Shuman* v. *Cherry*, 215 Ark. 342, 220 S. W. 2d 817, (1949), again confirmed that five years, and no more, is the applicable redemption period.

Actually the Court of Appeals cited and referred to a section of a statute enacted in 1937 (Vol. 2B, Ark. Stats. 1947 Annotated, Sect. 20-444) and a statute enacted in 1949, Id. Section 20-446.1 (long after petitioner's rights had been created by issuance of the bonds), and the 1949 statute was enacted after the period of redemption under former, applicable statutes had expired). Kirby & Castle Digest of the Statutes of Arkansas, Sections 6873 and 6874, Act 43 of 1915, Section 1.

The Court of Appeals gave undue weight to the fact that the state court officer who conducted the foreclosure sale had not in fact issued deeds to the sewer district after the redemption period expired December 1, 1946. The ownership of the lands had already vested absolutely in the sewer district under applicable state law and under adjudication of the Federal District Court itself. The issuance of deeds had long ago been ordered even by the state chancery court in which the foreclosure sale occurred. The actual signing of deeds should have been regarded a mere ministerial act to evidence ownership already vested. Under state statutes themselves such duties could be enforced even by mandamus. Act 84 of March 22, 1881, of Arkansas Acts, Section 26, at page 177.

Petitioner submits that under applicable law, the decisions below were erroneous.

4. Application of a redemption statute in such manner as to enlarge the period of redemption after the time for redemption had expired under prior law and under prior construction and application of redemption statutes, in effect when petitioner's rights were created, unlawfully impairs the obligation of contract in violation of Article I, Section 10, of the Constitution of the United States. *Barnitz v. Beverly*, 163 U. S. 118, 16 S. Ct. 1042, 41 L. Ed. 93, in which this Court, in holding unconstitutional a change in law to permit redemption, where none had been provided in the law in force when the mortgage was granted, the Court said: "If such rights may be added to the original contract by subsequent legislation it would be difficult to say at what point they must stop . . . and the right of redemption may be so prolonged as to deprive the mortgagee of benefit of his security by rendering the property unsaleable for anything like its value." 163 U. S. 118, at 124; 41 L. Ed. 93, at 99.

The decision below is in conflict with *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 55 S. Ct. 555, 79 L. Ed. 1298, in which the opinion of the Court notes that by such changes in the rights under a mortgage, the state law takes from it the quality of an acceptable investment for a rational investor, and that when extensions are so piled up as to make the remedy a shadow, such extensions are invalid. In that case the application of state law was challenged as violating both the clause prohibiting impairment of contracts and the due process of law clause.

The laws in force when the bonds and mortgage securing it were issued formed a part of the contract, and the five-year redemption provision could not constitutionally be altered either by subsequent legislation or by decision of state courts altering the construction and application of the provision to permit redemption over 16 years after sale to the sewer district. *Gelpcke* v. *Dubuque*, 68 U. S. 175, 1 Wall. 175, 17 L. Ed. 520.

5. The courts below found that petitioner had not been deprived of constitutional rights (due process and equal protection) solely on the basis that ownership of the lands involved had not become vested in the sewer district (for benefit of petitioner). The opinion of the Court of Appeals expressly excluded from its decision the question whether petitioner would have been deprived of such rights if deeds evidencing ownership had been issued to the sewer district upon expiration of the five-year period of redemption, and, nevertheless, the state law had been applied to permit redemption over 16 years after the foreclosure sale. As noted in this portion of the petition, ownership had vested under applicable law and under specific decision of the Federal court in 1956, and the decisions below were erroneous in holding the contrary, and the application of state law did deprive petitioner of such constitutional rights by the redemptions permitted and sanctioned over 16 years after

sale to the sewer district. Analogy can well be made to removal of a bar of a statute of limitation by subsequent law passed after the bar has become perfect and after ownership of property has become vested by virtue of the statute of limitation later cancelled. In *Campbell* v. *Holt*, 115 U. S. 620, at 623, 6 S. Ct. 209, at 211, 29 L. Ed. 483, at 485, it is said that such disturbance of vested rights would deprive the holder of property without due process of law. Further, here, the granting of redemption over 16 years after sale, was an unreasonably long extension, not justified by any suggestion of public emergency, and amounted to a taking without due process. Cf. *Block* v. *Hirsh*, 256 U. S. 134, 41 S. Ct. 458, 64 L. Ed. 865; *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413.

6. The decisions of the courts below of which review is sought superseded and nullified the decision of Judge Trimble in 1956 in this same action which was an adjudication fixing petitioner's rights, on which it had a right to rely. No appeal was taken from the 1956 adjudication. The later opinions of the courts below merely ignored it, gave full faith and credit to the State court decision, and rendered later decisions in the Federal proceeding in conflict with the former and then refused issuance of writs of execution or other relief to enforce the basic judgment. Such circumstances may not have been presented to this Court heretofore. They certainly appear unusual in the administration of law and justice in Federal courts. Petitioner urges that his rights not to be deprived of property without due process of law under Amendment 5 to the Constitution of the United States were thus violated, and that such proceedings were such a departure from the accepted and usual course of judicial proceedings as to call for this Court's attention and correction.

CONCLUSION

This case presents questions of importance warranting review by this Court, and the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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of Counsel

APPENDIX A—STATUTES

KIRBY & CASTLE DIGEST OF THE ARKANSAS STATUTES—(1916)

Section 6873. In all sales made by commissioners under decrees of chancery courts for foreclosure of delinquent special assessments in improvement districts in cities and towns, the court may approve the sale subject to the right of redemption, and immediately upon such approval the purchaser shall have the right to possession of the lands and premises so sold and may have process therefor, and such purchaser while so in possession shall not be accountable for rents upon redemption; *provided, however,* that such purchaser shall not dispose of nor injure the timber nor minerals nor fixtures upon the property until the expiration of the right of redemption; and shall not recover in case of redemption for improvements upon the property. (*Act 43 of February* 9, 1915, Sect. 1).

REDEMPTION OF PROPERTY

Section 6874. Any person, firm or corporation, or the heirs, assigns or legal representatives of any person, firm or corporation, who would have been permitted to redeem had the sale been by the collector for State and county taxes, or who was in possession under color of title at the time of said decree of sale, shall have the right to redeem from said sale at any time within five years, by payment, to the clerk of the chancery court as ex-officio commissioner of the purchase price at such commissioner's sale together with interest thereon at the rate of ten per centum per annum upon lands having a rental value at any time during the period allowed for redemption, and at the rate of twenty per centum per annum on lands having no rental value, together also with all costs of redemption, and any

taxes and special assessments meantime paid by the purchaser, together with the interest on such at the rate of ten per centum per annum (166). *(Act 43 of February 9, 1915, Sect. 1).*

Section 6903 (in part). "If any lands sold under this Act shall not be redeemed within the time allowed herein, the court in which suit is brought for the condemnation thereof shall direct a commissioner to execute to the purchaser or his assignee a deed. . . ." (Act March 22, 1881).

ARKANSAS STATUTES ANNOTATED, Volume 2 B:

Section 20-444. [IN PART]. Time for trial—Continuance—Decree for sale—Advertisement—Sale—Deed—Effect. —. . . and such commissioner shall by proper deed convey to the purchaser the lands, lots, blocks, or parcels or land, railroad tracks and right-of-way so sold, and the title to such property shall thereupon become vested in such purchaser as against all others whomsoever, . . . (Acts 1937, No. 207, §4, p. 758)

Section 20-445. Sale to plaintiff when no other purchaser. —At such sale if there be no purchaser offering as much as the total tax or assessment, plus penalty, interest and all costs and attorney fees allowed, then said property shall be struck off to the plaintiff. (Acts 1937, No. 207, §5, p. 758)

Section 20-446.1. Redemption—Five year limitation.—The owner of any land sold for delinquent installments due municipal districts shall have the right to redeem at any time within five [5] years from the date of sale by paying the purchaser, or his assignee, the sale price plus interest from the date of sale (by paying the purchaser, or his assignee, the sale price plus interest from the date of sale) to the date of redemption at the rate of 6 per cent per annum. (Acts 1949, No. 195, §21, p. 598)

Federal Statute

June 25, 1948, c. 646, 62 Stat. 947; 28 U. S. C. Sect. 1738, reads in part as follows:

> "Such judicial proceedings . . . shall have the same full faith and credit in every court within the United States as they have by law or usage in the courts of such State . . . . from which they are taken."

Federal Constitutional Provisions

Article 1, Sect. 10, in part:

> No state shall . . . pass any law impairing the obligation of contracts . . .

Amendment 5 (in part):

> No person shall . . . be deprived of . . . property, without due process of law . . .

Amendment 14, Sect. 1 (in part):

> . . . nor shall any state deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B—OPINIONS
UNITED STATES DISTRICT COURTS
EASTERN AND WESTERN DISTRICTS
OF ARKANSAS

P. O. Box 429
Little Rock, Arkansas
December 8, 1960

Mr. S. L. White, Atty. at Law,
Union National Bank Building,
Little Rock, Arkansas.
Mr. Charles E. Gardner, Atty. at Law,
Russellville, Arkansas.

Re: Whitaker & Co. v. Sewer Improvement District No. 1, Dardanelle, Arkansas, Little Rock Equity Case No. 2856.

Gentlemen:

Consideration has been given to the "Petition of Plaintiff for Review of Case and for Rule on Defendant to Show Cause," which was filed in this matter by Mr. White on May 31, 1960, to the response filed by the Commissioners of the Sewer Improvement District No. 1, Dardanelle, Arkansas, and to the informal briefs that have been submitted by both sides.

As I understand the Petition above mentioned, plaintiff's primary purpose, or rather the primary purpose of Mr. Roy A. Dickie who claims to be the owner of the original judgment obtained by Whitaker & Co., is to obtain an adjudication in this Court that the Sewer District is the owner of certain tracts of land in the City of Dardanelle which were foreclosed in 1941 in a suit brought in the Yell County Chancery Court by Mr. D. A. Love, the Receiver appointed by this Court in this action, to foreclose delinquent sewer assessments, and which were not redeemed by

the property owners within the time prescribed by the relevant Arkansas Statutes. Petitioner also seeks an Order directing the present Commissioners of the District to take charge of the properties, to collect rentals thereon, and to present a plan for liquidation of the Chancery Court Judgment. In the alternative petitioner asks that writs of execution be issued against the tracts of land described in the Petition, for costs and for other relief.

From a reading of the Opinion of the Supreme Court of Arkansas in the case of Whitaker & Co. v. Sewer Improvement District No. 1 of Dardanelle, Arkansas, — Ark. —, 318 S.W. 2d 831, a proceeding to which both Whitaker & Co. and Mr. Dickie were parties, it seems clear that that Court held that Whitaker & Co. and Mr. Dickie were not entitled to the basic relief which they are now seeking in this Court by means of the instant Petition. Rather, the Supreme Court of Arkansas held that the owners of the tracts of land there involved, and which also seem to be involved here, would be entitled to keep their property by paying up all delinquent assessments for all prior years plus 6 per cent interest, and such property owners were given a limited period of time within which to effect such redemptions. Since Whitaker & Co. and Mr. Dickie were parties to the proceedings which lead to the decision just abstracted, they are bound thereby and may not re-litigate the matter here.

In their response to the Petition the Commissioners say that all of the property owners were given an opportunity to redeem, and that as of the date upon which the response was prepared all but one of such property owners had redeemed. By this time that owner may have effected a redemption. If he has not, then, under the holding of the Supreme Court of Arkansas, the Commissioners have the right to apply to the Chancery Court of Yell County for a deed to such owner's properties, which properties they may

sell or otherwise dispose of as appears desirable. (318 S.W. 2d at 836.) The Commissioners state further that there remain unpaid a small number of assessments, and that the Commissioners are proceeding legally to effectuate a collection of said benefits.

Counsel for the plaintiff has not challenged the factual correctness of the Commissioners' Response, and the Court accepts it as true. Further, the Court will presume until the contrary appears that the Commissioners will act with diligence in the light of the decision of the Supreme Court of Arkansas heretofore cited and of earlier orders of this Court in this cause.

As to the other relief requested in the Petition, the Court sees no occasion to name any additional defendants in this action, or to enter any order requiring the Commissioners to supply the information and explanations requested by plaintiff. An order is being entered today denying the Petition. A copy of said Order is enclosed for each of you. A signed copy of this letter is being filed with the Clerk as a memorandum opinion.

Now, this brings us back to the basic dispute with regard to Mr. Parker's claim for additional compensation. In view of the holding of this Court in connection with plaintiff's Petition, it may be that Mr. White and Mr. Parker will find it possible to resume their negotiations and settle the differences between them.

Very truly yours,
/s/ J. Smith Henley,
U. S. District Judge

SUPREME COURT OF ARKANSAS

WHITAKER & COMPANY ET AL ..... *Appellants,*

v. No. 5 1644

SEWER IMPROVEMENT DISTRICT NO. 1 OF DARDANELLE, ARKANSAS ..... *Appellee.*

NOV. 24, 1958

REHEARING DENIED JAN. 12, 1959

McFADDIN, Justice.

This appeal involves matters of Sewer Improvement District No. 1 of the City of Dardanelle, Arkansas (hereinafter called "District"), occurring at various times from 1936 up to the present. A chronological statement, though lengthy, may serve to an understanding of the points presented on this appeal.

1. The District was organized in 1917 under the Municipal Improvement District Statutes then in effect (see §20-101 et seq., Ark. Stats. for the present statutes). In 1918 the District sold $32,500.00 of its 6% bonds, secured by mortgage of the assessed benefits. The bonds were payable serially and annually from 1918 to 1939. Whitaker & Company (who, along with Roy A. Dickie, will hereinafter be referred to as "Appellants") became the owner of some, if not all, of the bonds issued by the District. The maturing bonds and interest appear to have been regularly paid until 1928, when the District defaulted.

2. In November, 1936 Whitaker & Company, on behalf of the bondholders, filed complaint against the District in Case No. 2856 in the United States District Court for the Eastern District of Arkansas (which case and Court are hereafter referred to as "Federal case" and "Federal Court"). The complaint was to obtain judgment for debt, to foreclose the mortgage, and for other relief. In October, 1937 the Federal Court entered a decree awarding judg-

ment to the plaintiffs and appointing a Receiver for the District to foreclose in the State Court the District's lien on delinquent assessments. A portion of the judgment became owned by R. A. Dickie. The Federal Court appointed D. A. Love as Receiver of the District. Other Receivers were substituted by Federal Court order over the years, but we use the term "Receiver" to designate the person acting under the Federal Court orders.

3. In 1939 a suit was filed by the Receiver in the Yell Chancery Court to foreclose the District's lien for delinquent assessments against each parcel of land in the District. This was Case No. 1522 in the said Chancery Court, and will be hereinafter referred to as the "State case" and the "State Court." That case was styled on the docket of the State Court as, "D. A. Love, Receiver, Sewer Improvement District No. 1 of Dardanelle, Arkansas, Plaintiff, v. Delinquent Lands, Defendants." Foreclosure decree was entered in the State case in 1941 and sale ordered. We will subsequently refer to this as "the 1941 foreclosure." At the sale by the Commissioner of the Court, all parcels not sold to other parties were sold to the District. The report of sale of the Commissioner in Chancery was approved by the State Court, and the Commissioner in Chancery was directed to issue deeds to purchasers after the time for redemption had expired. The Commissioner in Chancery died, and there is no record of any deeds being issued. The original file of proceedings in the State Court has been lost; but it is apparent from the docket entries, record entries of proceedings, and by other evidence, that most of the parcels of land in the 1941 foreclosure suit were sold to the District. No disposition of any of the parcels seems to have been made until the decree here challenged.

4. For many years after 1941 the matters of the District lay dormant or semi-dormant in both State and Federal Courts, although some interlocutory orders were made

in the State Court, as well as in the Federal Court. At various times Receivers were substituted by the Federal Court in the place of D. A. Love; and other interlocutory orders were made; but the recital of any of these is not essential to the issues here. The effect of Act No. 79 of the 1933 Arkansas General Assembly was not called to the attention of the Federal Court for many years. Then in 1956 in the Federal case, the Court appointed the Commissioners of the District, "to proceed in good faith and with all reasonable speed to liquidate the assets of the District[1] * * *."

5. In 1956 Whitaker & Company and R. A. Dickie intervened in the Case in the State Court and alleged: (a) that the judgments rendered by the Federal Court in the Federal case in their favor remained unpaid, and with interest, amounted to approximately $42,000; (b) that the unpaid and unforeclosed benefits did not equal said judgment; (c) that the District has property which it acquired in the 1941 foreclosure in the State case; (d) that said property should be sold and proceeds applied on the $42,000 claim; and (e) for all other relief. This intervention stirred the District and the Commissioners to action. The Commissioners (Webb, Snyder, and Keenan, as named in the Federal Court order, supra) filed their pleading in the State case, pointing out: that many property holders had been willing to pay delinquencies as soon as the legality of the 1941 foreclosure suit in the State Court could be determined; and that the question was whether in the light of said Act No. 79 of 1933 a Federal Receiver could foreclose in the State Court in the place of the Commissioners of the

[1]This order of the Federal Court recites in part: "It is further ordered by the Court that the Commissioners of said District, namely, Harold Snyder, Lewis A. Webb and Dan Keenan, proceed in good faith and with all reasonable speed to liquidate the assets of said District and wind up the affairs of said District to the end that the judgments in this cause may be satisfied, or so much thereof as possible; * * *."

District. The Commissioners expressed a desire and willingness to proceed as soon as, and in the manner, directed by the Court. Other pleadings were filed by various intervenors and *amici curiae*.

6. There was a trial in the State Court on the various issues; and documents were introduced showing various orders and proceedings in both State and Federal cases during the many years intervening from 1936 to the present. The recitation of all of this would serve no useful purpose. On March 17, 1958 the learned Chancellor rendered the decree here challenged on appeal. In that decree the Chancellor of the State Court said:

> "A matter of prime concern at this time is the determination of the validity or invalidity of the foreclosure obtained in the name of the Receiver. The issue is presented to the court upon the petition of the Representatives of the judgment holders in Federal Court who contend the title to the foreclosed lands is already in the District and this court should direct a commissioner to prepare proper deeds to the district and then subject the lands of the district to the satisfaction of their judgment.
>
> "The Commissioners of the District ask that the entire foreclosure proceeding be declared a nullity and and this court set forth instructions how to marshal the assets of the District.
>
> "It is apparent that some past commissioners of the District have by word and action led the owners of delinquent property to believe that the foreclosure proceeding was void and should be disregarded, and it is more than just a possibility that such action together with the disregard of the provisions of Act 79 of 1933 caused the chancery court of Yell County to hold the execution of deeds in abeyance."

And again the Chancellor said:

"The decree of the Yell Chancery Court has been on record since 1941. The subject matter was within the jurisdiction of the court. The owners of the delinquent land knew that the taxes had not been paid. No attack was filed in either court asking the removal of the Receiver. The Receiver collected some delinquencies and executed proper receipts and releases. To hold the Receivership void would be to penalize those taxpayers who were trying to pay what they knew they owed. Certainly their payments to the Receiver were valid extinguishment of the taxes levied against them. Every act of the Receiver was pursuant to his authority emanating from the United States District Court; and in this foreclosure action had the added authority of being within the jurisdiction of the Yell Chancery Court.

"This Court, therefore, holds that the Receivership was a valid receivership and the judgment of the Yell Chancery Court a valid judgment. Without relying in any manner upon any argument based upon whether or not the Yell Chancery Court judgment can be properly attacked at this late day in this matter this court finds that the foreclosure was and is a valid foreclosure.

"At the same time this court finds that the commissioners of the District should be substituted as parties plaintiff and stand in the place of the Receiver in this action (Chancery No. 1522); that the commissioners shall compute the delinquencies against the lands involved in this action with interest at the rate of 4% per annum[2] and cause notice of such delinquent amounts and the delinquent property to be published

[2]This 4% interest rate will be discussed in Topic II infra.

in the Dardanelle paper for 3 consecutive weekly issues notifying all interested parties and persons that owners of the delinquent lands can and may redeem the same by paying the delinquency with accumulated interest within 90 days from the date of the first publication of such notice.

"The Commissioners of the District are hereby directed to proceed to collect the assets of the District including the delinquencies hereinabove referred to and in an orderly manner proceed to administer the affairs of the district to the end that whatever amounts are available to pay to creditors will be speedily made available for that purpose."

7. Under the said Decree there were other provisions wherein the Commissioners were directed to proceed in a manner which intervenors disliked; and from that decree the intervenors (Whitaker & Company and R. A. Dickie) bring this appeal, making three assignments, as follows:

"1. The Court erred in not ordering the issuance of deeds to the District of lands sold it at the foreclosure sale not redeemed within five years.

"2. The Court erred in fixing the rate of interest at 4% instead of 6% per annum on the delinquent assessments as provided in the judgment Jan. 10, 1941.

"3. The Court having upheld the validity of the foreclosure sale, erred in failing to direct the Commissioners to use sound judgment in disposing of properties for liquidation of debt."

The District as appellee says in its brief in this Court:

"The sole question bothering Commissioners is whether or not the Foreclosure Decree of the Chancery Court of Yell County, entered on the 10th day of January, 1941, is of such validity that title to real property

passed under and in accordance with it will divest the former owner of all right and claim which he may have had and invest the new owner with a good and indefeasiable, fee simple title.

"This question turns on whether or not the foreclosure suit brought solely in the name of D. A. Love, Receiver, for the Sewer Improvement District has any validity in light of Section 20-1120, Arkansas Statutes of 1947 (Act 79 of the General Assembly for the State of Arkansas for the year 1933) and the decisions of this Court interpreting that Act."

In the *amici curiae* brief filed on behalf of the City of Dardanelle, there is the argument that the 1941 foreclosure decree is completely void.

Having stated the chronology and the points on appeal, we proceed now to our decision.

[1, 2] I. *The Effect The Chancery Court Gave To The 1941 Foreclosure Decree Of The State Court.* A court of equity is a court of conscience: a forum wherein justice[3] is done, sometimes stripped of technicalities and red tape. A court of equity should be as alert to afford redress as the ingenuity of man is to cause situations to develop which call for redress. In one case we said:

"A court of conscience must keep the granted relief abreast of the current forms of iniquity. We should never naively refuse relief * * * simply because there is no similar instance of such * * * in any of the books." Renn v. Renn, 207 Ark. 147, 179 S.W. 2d 657, 661.

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[3]In 19 Am. Jur. 41 (Equity § 4) this statement appears: "But the primary character of equity as the complement merely of legal jurisdiction, in that it seeks to reach and do complete justice, where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of cases, are incompetent so to do, persisted and still persists."

In the case at bar the court of equity wisely considered the relative positions of the various parties and rendered a decree that does substantial justice to all.

The appellants contended in the lower Court: (a) that the 1941 foreclosure decree was valid; (b) that the District owned the land that was sold to it in the said foreclosure sale; and (c) that the Commissioners should immediately sell the land and pay the appellants' claim. The appellants also alleged in their intervention, "* * * that the assessments remaining unpaid in said Sewer Improvement District, all of which are delinquent, if collected, would not pay even one-third of the judgments; and that the only manner in which Roy A. Dickie will ever receive the amount to which he is entitled is by the plaintiffs, that is, the District, obtaining title to the various tracts of land which have been sold to the District and not redeemed within the time provided by law."

We find no substantial evidence in the record to support the copied allegations. Evidently the appellants meant, by the copied allegations, to state that with the District owning the foreclosed property and with no assessments thereafter collected on said property, then the assessments remaining unpaid on the other property would not pay the appellants' judgments. But under the order of the Chancery Court here appealed, the Commissioners must collect *all delinquent assessments on each parcel* of property sought to be redeemed, together with interest from the date each assessment was due until it is paid. That is to say, the Commissioners calculate not only the assessments that were involved in the 1941 foreclosure, but all subsequent assessments. The adding of these subsequent assessments, together with interest, will materially change the situation from that alleged by the intervenors, as above copied. If any parcel sold to the Receiver (District) in the 1941 foreclosure sale is not so redeemed within the limited time

stated in the decree here challenged, then the Commissioners will forthwith be entitled to a deed to such property; and thereupon the Commissioners will have the right of sale. So we fail to see how the appellants can be seriously hurt under the decree that the Chancellor rendered herein.

[3, 4] On the other hand, appellees stated in their pleadings that some of the property holders had been advised that the 1941 foreclosure decree of the State Court was void because the Arkansas statute forbade the appointment of an outside third person as a Receiver. The appellees ask for instructions.[4] Conceeding only for the sake of argument that the 1941 foreclosure proceeding in the State Court could be held to be a nullity, then the unpaid and delinquent assessments involved in that proceeding are still due, and all subsequent delinquent and unpaid assessments are still due; and all of these should be foreclosed. Against these assessments there could be no successful plea of limitation because the statute provides (§20-414, Ark. Stats.): "Said local assessment shall be a charge and a lien against all the real property in said district, • • • and shall continue until such assessment, with any penalty and costs that may accrue thereon, shall be paid;[5] • • • •." We hold in Martin v. Board of Commissioners, 190 Ark. 747, 81 S.W. 2d 414, and in Lueken v. Burch, 214 Ark. 921, 219 S.W. 2d 235, that the statute of limitations does not run against the right of an improvement district (such as

[4]Of course, the *amici curiae* claim that the whole 1941 proceeding is void; but, even so, it would not relieve the property from the unpaid benefits as hereinafter discussed.

[5]Act 85 of 1925 prescribing a period of limitations for filing foreclosure suits for delinquent assessments applies only to Counties having a population of 75,000 or more; and we judicially know that Yell County does not have such population, so Act 85 of 1925 has no application.

the one here involved) to foreclose its lien.* If the entire 1941 suit had never been filed, a foreclosure could not be maintained for *all* delinquent assessments, penalty, and costs against each parcel of property. At some time the property owner of eacn tract must pay the amounts due or lose the property; so the setting aside of the 1941 foreclosure proceeding in the State Court would not defeat payment.

[5] The appellants, as judgment creditors, are entitled to payment—not property. The plan evolved by the learned Chancellor will produce money because of the necessity of redemption. If the property owners do not pay, then they will lose their property. In Greer v. Blocker, 218 Ark. 259, 236 S.W. 2d 68, 77, a drainage district had for many years held title to several thousand acres of land acquired by it at a foreclosure sale for delinquent assessments. We said in that case: "Also the Chancery Court should direct the Receiver to ascertain and report the wise way to dispose of the lands on hand, so that the most money may be realized therefrom; in short, the Chancery Court should direct the Receiver to undertake the liquidation of the debts of the District * * *." In the case at bar, the Chancellor has evolved a plan which is designed to accomplish for Sewer Improvement District No. 1 of Dardanelle exactly what should be done: the obtaining of all delinquent assessments and interest thereon or title to the property that remains delinquent. So, with the exception of the interest rate—to be discussed in Topic II *infra*—we think the Chancellor's decision was just and equitable in all respects.

*The language in § 19 of Act 195 of 1949 (as found in §20-422, Ark. Stats.), in using the words, "within six [6] months", is directory merely. The statute that is amended (§ 7313, Pope's Dig.) had used the word, "straightway"; so that 1949 Act in using the words, "within six [6] months", was directory and did not provide a period of limitation.

II. *The Interest Rate.* The Chancery Court provided interest at 4% per annum to be paid on each delinquent assessment[7] when any property holder sought to redeem. Since the judgment of the appellants bore 6% interest and the bonds were 6% bonds, we conclude that the interest rate, to be charged by the Commissioners on each delinquent parcel sought to be redeemed, should be 6% per annum, so that the appellants cannot lose because of interest rate.

Who can complain at 6% per annum interest? (1) Certainly not the property holders (see City of Eureka Springs v. Banks, 206 Ark. 289, 174 S.W. 2d 947). If the property owners pay 6% per annum interest they are still receiving a most equitable consideration. (2) Certainly not the appellants. They purchased bonds that bore 6% interest and looked to the assessed benefits. If the Chancery Court requires the interest rate for the redemption to be 6% per annum on each delinquent assessment from the time of delinquency until paid, then the amount received from the interest will be at the same rate as the interest on the bond issue and the judgment they hold.

We modify the decree to make the interest rate on redemption to be 6% per annum instead of 4% per annum. In all other respects the decree is affirmed at cost of appellants. The cause is remanded to reinvest the Chancery Court with jurisdiction for further proceedings.

WILLIAM J. SMITH, J., not participating.

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[7]Since the benefits were payable 4% each year until paid sufficiently to retire the bonded indebtedness, the Chancellor may have used the 4% interest rate, although his reason for using 4% interest instead of 6% is not stated.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

ROY A. DICKIE,
ASSIGNEE OF WHITAKER & CO., INC. ..... *Appellant*,

v. No. 17,090.

SEWER IMPROVEMENT DISTRICT NO. 1 OF
DARDANELLE, ARKANSAS, ET AL. ..... *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

[MARCH 2, 1964]

Before JOHNSEN, Chief Judge, and MATTHES and RIDGE, Circuit Judges.

JOHNSEN, Chief Judge.

The appeal springs from an order closing a suit, which had been instituted in 1936 by appellant's assignor for recovery of a judgment on some defaulted bonds of an Arkansas Sewer Improvement District and for enforcement of the security thereof, consistsing of a trust instrument (designated "mortgag , of assignment and lien on the assessed benefits from the improvement. The suit rested on diversity jurisdiction.

The court entered judgment on the indebtedness in 1937; appointed a receiver to make collection of the delinquent assessments; authorized the receiver to bring foreclosure proceedings on the security in the State Chancery Court; and reserved jurisdiction to make any additional orders that might be necessary or expedient. The receiver

brought such proceedings in the Chancery Court in 1939; a decree was entered in 1941; and the properties were ordered sold, with the District becoming the purchaser of most of the parcels. Approval of the sales was made by the Chancery Court in 1941, and deeds were directed to be issued. Under the statute, the land owners were allowed a period of five years in which to make redemption.

No deeds were, however, issued to the District, nor was any attempt made otherwise to oust the land owners of their title and possession until 1956, when appellant, as assignee of the federal court judgment, filed a petition of intervention in the Chancery Court requesting that deeds be ordered to be issued forthwith to the District and that the properties then be subjected to the satisfaction of appellant's judgment. The Chancery Court made denial of appellant's petition and decreed instead that computation be made of the amounts of the delinquencies as to all of the properties and that the owners be granted 90 days after the filing thereof in which to make redemption for the amount of the delinquencies and interest.

An appeal was taken to the Supreme Court of Arkansas and that Court affirmed (except that it made increase of the interest rate), holding in effect that the allowing of such a further time for redemption, beyond the statutory period of five years, was in the situation of assessment foreclosure involved, with the property having been purchased by the District, and with issuance of deed not yet having occurred, valid under Arkansas law and was within the power of the Chancery Court to decree. *Whitaker & Co. v. Sewer Improvement District No. 1* (1958), 229 Ark. 697, 318 S.W. 2d 831.

Thereafter, in 1960, appellant filed an ancillary pleading in the federal court suit, captioned "petition for review of case and for rule on defendant [District] to show cause,"

seeking to have the land owners brought in as parties and to have them show what title, if any, they had to the properties in view of the 1941 sale; to have the Commissioners of the District file report of what actions they had taken in the situation; to have the court order the Commissioners to take charge of the properties, collect rentals thereon, and present a plan for the liquidation of appellant's judgment; or in the alternative to award appellant a writ of execution against the properties on the basis of his judgment. The district filed an answer showing that all of the land owners except one had made redemption of the properties under the Chancery Court's decree and further stating that the Commissioners of the District were then engaged in effecting collection of such assessments as still remained.

The District Court entered an order denying appellant's petition. It regarded the primary object of the petition as being to have the federal court ignore the decree of the Arkansas courts which had allowed the land owners additional time to redeem; to have it treat the 1941 sales, the approval made of them at the time, and the lack of redemption during the statutory period, as having vested absolute legal title in the District; and to have it deal with the properties upon that basis in relation to appellant's judgment. The court declared that, in intervening and seeking relief, appellant was adjudicatively bound by the Chancery Court's decree and the Arkansas Supreme Court's affirmance thereof, "and may not re-litigate the matter here."

It will be noted that the court's denial of appellant's petition was made in 1960. Appellant filed a timely notice of appeal from the order, but later had the court make dismissal of the appeal under the provisions of Rule 73(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. Appellant apparently came to the conclusion that the court's

1960 order did not constitute a "final decision" within 28 U.S.C.A. §1291 and that it first became so upon the entry of the court's order closing the case in 1962. He therefore is attempting to have us now review the denial which was made of his petition in 1960. He points out that the District Court similarly regarded its order closing the case as imparting such finality by providing in its "Memorandum and Order" that "All the issues between the parties have now been adjudicated, and the case should be closed, subject to the right of any affected party to appeal from any Order adversely affecting him."

There may be a question as to whether the 1960 order, in holding the decree of the Arkansas courts as to redemption rights of the property owners to be res adjudicata, and in refusing to award execution against the properties as being on that basis not owned by the District, was not of such nature as to have made it appealable under 28 U.S.C.A. §1291 at the time. On the other hand, it is possible to argue that there is no compelling reason why it should be so regarded, in view (a) of the court's apparent concept and intent, as indicated above, that its orders on collateral incidents were not to be thus final until the closing of the case; and (b) of the fact that appellant's judgment might perhaps become satisfied otherwise before the case was closed, so that there would be no reason why an appellate court should be called upon to deal with the matter of prejudice until closing of the suit occurred. We feel warranted in accepting these practical considerations in the situation and so shall not pursue the question further.

The basic grievance at which the appeal is directed is the recognition which the District Court gave to the Chancery Court's decree; its holding that the decree was res adjudicata as to the land owner's right to redeem from the District's purchase of the property; and its refusal on this basis to award appellant execution upon his judgment

against the properties as not having become vested in the District.

The substance of the argument made is that the state court's action in allowing redemption by the property owners after five years was illegal under the Arkansas statutes; that it was an improper deprivation of appellant's right under his judgment to have execution issued and levied upon the properties as being vested in and owned by the District and hence constituted a violation of due process; that the decree was therefore constitutionally void; and that it was error for the District Court to refuse so to hold.

The District Court was, of course, neither required nor entitled to give full faith and credit to the state court decree, if it was constitutionally void. *Old Wayne Mut. Life Ass'n* v. *McDonough*, 204 U.S. 8, 23, 27 S. Ct. 236, 241, 51 L.Ed. 345; *Griffin* v. *Griffin*, 327 U.S. 220, 228-229, 66 S.Ct. 556, 560, 90 L.Ed. 635. We do not believe, however, that the decree could be held to be thus invalid.

Owners of land sold for delinquent installments due an Arkansas Municipal Improvement District have by legislative act been given a legal "right to redeem at any time within five [5] years from the date of the sale." Ark. Stats. 1947, §20-466.1. See also *Schuman* v. *Cherry*, 215 Ark. 342, 220 S.W. 2d 317. Unless the sale proceedings are themselves defective, a land owner is, after the expiration of the time allowed by the statute, without basis to seek to make redemption as a matter of right. *Beck* v. *Rhoads*, Ark., 361 S.W. 2d 545.

The fact, however, that the statute does not allow redemption as a matter of right after five years does not make it a federal constitutional violation for the Arkansas Supreme Court to construe the statute as not precluding the granting of a privilege of redemption by the Chancery

Court, beyond the five years, as a matter of judicial grace, in a situation of equitable circumstances, where no vested legal right is thereby impaired. Construction of the Arkansas statutes is for the Arkansas courts, and such construction is not a matter of federal concern if it does not abortively deny recognition to and vindication of plainly vested legal rights so as to violate due process or equal protection under the Fourteenth Amendment.

We need not here consider whether, if the situation had been one in which there had been an issuance of deeds under the statute and the five-year period of redemption had expired, the Arkansas courts could, without violation of the Fourteenth Amendment, deprive the purchaser of the legal-title rights purporting to be vested by the statute in these circumstances (or whether judgment creditors of the purchaser could be thus collaterally prejudiced) by the granting of a redemption extension. We intend no intimation either way upon that question.

The Arkansas Supreme Court, as we read its opinion, did not hold that, under §20-446.1, supra, and §20-445, post, in a situation where approval of sale had been made, deed had been issued, and five years had gone by, legal title would not have become so vested and absolute as to preclude the granting of an auxiliary privilege of redemption by the Chancery Court. It need here be observed only that, under the language of §20-445, directing that deed be issued by the commissioner, and providing that the effect thereof shall be that "the title to such property shall *thereupon* become vested in such purchaser as against all others whomsoever * * *" [emphasis added], it would appear that, without and until such issuance of deed, the purchaser could not claim to be vested with actual legal title, and hence equitable hold could still remain.

Our decision that what the Arkansas courts did in the situation here was not constitutionally invalid, and that

the decree of the Chancery Court and its affirmance by the Supreme Court were therefore required to be accorded full faith and credit, makes it unnecessary also for us to consider whether, if the holding and decree of the Arkansas Courts had been invalid as against the District, appellant would still not be entitled to ask to have execution issued and levied on the properties as against the District, in view of the redemptions which the District had allowed to be made and which seemingly could not be said to involve fraud or bad faith between it and the land owners as a basis on which to predicate judgment-creditor reach.

Further, we have not deemed it material to set out the equities which prompted the Chancery Court to exercise grace in the particular situation. These can be found in the opinion of the Arkansas Supreme Court, supra, 229 Ark. 697, 318 S.W. 2d 831. Other matters as to which interest may perhaps be collaterally awakened appear in our opinion in *Whitaker & Co. v. Sewer Improvement District No. 1*, 8 Cir. (1955), 221 F. 2d 649.

We shall only add that, of course, neither the fact that appellant is here being held to be without federal right to have execution issued and levied upon the properties purchased by the District and redeemed under the Chancery Court's decree, nor the fact that the District Court has closed the case on its records as to the incidents involved before it since the suit was instituted, is meant to preclude appellant from any remedies, either in law or in equity, which may exist otherwise for obtaining satisfaction of his judgment.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C — EARLIER OPINIONS

WHITAKER & CO. *v.* GRABLE.

No. 11583.

Circuit Court of Appeals, Eighth Circuit.

Feb. 20, 1940.

Appeal from the District Court of the United States for the Eastern District of Arkansas; Thomas C. Trimble, Judge.

WOODROUGH, Circuit Judge.

This suit was brought against Sewer Improvement District No. 1 of Dardanelle, Arkansas, by the holder of certain bonds issued by the District and secured by pledge of "all the uncollected assessments of the District". The bonds being in default, the plaintiff, pursuant to the terms of the pledge, obtained appointment of a receiver to enforce the pledge and by final decree the bondholder's lien was established and the receiver was ordered to apply the proceeds to the satisfaction of the bond indebtedness. Mr. Conn Grable, who holds certain certificates of indebtedness which were issued by the sewer district and were subsequently reduced to judgment against the District in the state court, intervened in the bondholder's suit and obtained a decree therein which accorded him a lien against the pledge then in the receiver's hands "on a parity with" the lien of the bondholders and which required the receiver to make distribution pro rata on the bonds and the certificates. The receipts are asserted to be inadequate for both, and the bondholder appeals, contesting the right of the holder of the certificates and judgment to any lien in parity with its lien against the security pledged by the District for the payment of the bonds.

Many points are raised against the procedure by which the decree in favor of the intervener was arrived at, but

we direct our inquiry to the questioned sufficiency of the facts alleged by the intervener to justify the decree in his favor. It is undisputed that the bonds were lawfully issued to pay for the installation of the sewer system for the use of the inhabitants of the District and that the pledge executed in writing by the District to secure the payment of the bonds was in all respects in accord with the relevant statutes of Arkansas, Kirby's Digest, §§ 5664-5742, and that by its terms "All uncollected assessments levied by the ordinance of the town Council of the said town of Dardanelle (describing it) * * * together with all assessments that * * * may hereafter be levied upon the real property in said District * * * except the assessments for the first year" were by the District, "pledged, assigned, transferred and set over" to a designated trustee to effectuate the pledge, and it was agreed that in proceedings to foreclose the pledge a receiver should be appointed to collect all of said assessments. The bonds bear date September 1, 1917, and on their face contain the promise of the District to pay the amounts named, refer to the law under which they are issued, recite that all conditions have been complied with and that the assessments are pledged for their payment, principal and interest.

On the other hand, the pleadings in intervention show that the certificates of indebtedness held by the intervenor contain no analogous recitals. There are three certificates. The first was issued June 28, 1918, and recites that the District is indebted to the party named therein for services rendered and promises to pay him or order the sum of $400 on or before July 1, 1919, with interest at six per cent. On the face of the second, dated November 15, 1918, the District promises to pay the persons named or bearer, the sum of $661, with interest, on or before May 15, 1919, and recites that the obligation "is payable out of taxes heretofore levied by the District which are sufficient to meet said obli-

gation at maturity". The third bears the same date and is payable on or before November 15, 1919. It is in form like the second, the amount payable on or before November 15, 1919, being $1,000. Comparison of date discloses that the certificates were issued long after the plaintiff's bonds and pledge, and they contain no agreement by the District to pledge security for their payment.

When the intervener brought his suit on the certificates against the District in the state court, he alleged in his complaint as to the first certificate that it had been issued by the District "in order to carry out the purposes for which the defendant district was organized" without further indication of the consideration or origin. As to the other two, he alleged that the District had issued them "in order to pay a part of the cost of installing the sewer system constructed by the defendant district". On February 11, 1935, he obtained a judgment by default in the ordinary form of a money judgment in law actions, the writs of execution to be issued "upon application".

[1] We are not persuaded that the mere issuance and delivery by the District of the three certificates of indebtedness gave to their holder any lien upon the property in the District or upon the assessment of benefits theretofore made against the property and pledged for the payment of the District's bonds.

In the argument to support the intervener's decree, it is pointed out that under Arkansas decisions "certificates of indebtedness", "notes", "warrants" and other evidences of debt issued by municipal subdivisions have under various circumstances been held to come under the same category as "bonds", and the holders have been accorded rights as creditors equal to the rights of creditors holding bonds. All of the decisions referred to have been carefully reviewed, but regardless of what the documents held by

the intervener might be called, we fail to find in the cases any basis for his claim that the issuance and delivery thereof by the District gave rise to any lien in favor of the holder against any of the property in the District. They did not purport to do so, and we find no statute imputing such an effect. The cited statute, Kirby Digest, § 5720, provides: "The [Sewer Improvement District[1]] board may borrow money not to exceed ninety per centum of the estimated cost of the work, at a rate * * * not exceeding ten per centum per annum, and may pledge all uncollected assessments for the repayment thereof." Act, March 22, 1881.

[2] Although this statute empowers the Board to pledge assessments to secure money borrowed,[2] it does not compel the Board to do so. It does not itself create any pledge or lien in favor of whoever advances money or services to the District but merely says that the District Board may create such pledge.

The reliance of the intervener must be upon his judgment. Although the bondholders were not parties to the judgment and it was taken by default, we may here assume that it adjudicated against the District that the certificates had been duly issued "in order to carry out the purposes for which the District was organized" and "in order to pay a part of the cost of installing the sewer system constructed by the sewer district", as had been alleged in the complaint.

[3, 4] It has been held in Arkansas that a money judgment against such a municipal subdivision as is here involved operates to create a general lien against the prop-

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[1]Supplied.

[2]See *Arkansas Foundry Co.* v. *Stanley*, 150 Ark. 127, 233 S. W. 922; *Road Improvement District No. 4* v. *Southern Trust Co.*, 152 Ark. 422, 239 S. W. 8; *Logan* v. *Sidewalk District No. 6*, 163 Ark. 591, 260 S. W. 407. Ct. Kirby's Digest, §§ 5713, 5714.

erty in the district analogous to a certain extent to judgment liens against the property of other judgment debtors. *Keith* v. *Drainage District*, 183 Ark. 786, 38 S. W. 2d 755. But a judgment lien takes effect only from the date of the judgment and is subordinate to all valid prior liens. *McGuigan* v. *Rix*, 140 Ark. 418, 215 S. W. 611.

[5] It is apparent here that the valid special lien of the bondholders had attached and continued eighteen years before intervener's judgment was entered[3] and whatever lien was created by the judgment was subsequent and inferior to the lien of the bondholders.

Intervener has contended that the decision of the Supreme Court in *Arkansas State Highway Commission* v. *Kerby*, 175 Ark. 652, 655, 300 S. W. 377, gives support to his claim for lien on a parity with the lien of the bondholders, but we see none. In that case it appeared that the state of Arkansas in pursuance of its plan to incorporate highways into a state system had provided a fund to discharge debts incurred by the various districts in building district roads. It was held that debts of the districts evidenced by certificates of indebtedness were within the scope of the Act and were dischargeable out of the funds equally with debts evidenced by bonds.

In the more recent case of *Gaster* v. *Dermott School District*, 184 Ark. 536, 42 S. W. 2d 990, 992, a taxpayer obtained injunction against the issuance of refunding bonds by the District. The Supreme Court considered the foregoing case and quoted from the opinion: "The evident and avowed purpose of the act [The Martineau Road Act] under consideration was to aid road districts which had become overburdened with debt in the construction of the improved roads, and we are of the opinion that the word

[3] *Miller* v. *Hamilton*, 8 Cir., 233 F. 402; *Hopson* v. *Oliver*, 174 Ark. 659, 298 S. W. 489; *First National Bank* v. *Wells River Sav. Bank*, 179 Ark. 834, 18 S. W. 2d 370.

'bond', as used in the act, was meant to include promissory notes and certificates of indebtedness issued by the district for the purpose of constructing the improved roads, and that the words 'bond', 'note', or 'certificate of indebtedness' are but convertible terms. In short, we are of the opinion that the expression 'bond', as used in the act under consideration, was intended to cover all written obligations for the payment of money legally issued by the commissioners for the purpose of constructing the improved roads under the original acts creating the road districts."

Continuing, the court said:

"The judgment of the circuit court, directing the highway commission to pay the certificates held by Kerby, was therefore affirmed, but this order was affirmed because the Arkansas state highway commission had taken over the roads of the improvement district which had issued the certificates of indebtedness, and, having done this, it was held that, under the terms of the act under which the roads had been taken over and made a part of the state highway system, it became the duty of the commission to pay all of the said certificates of indebtedness involved in that case. It was therefore declared immaterial whether this indebtedness was evidenced by promissory notes, certificates of indebtedness, or negotiable bonds, and that these would be treated as convertible terms, inasmuch as the General Assembly had assumed the payment of the district's obligations.

* * * * * *

"Here, under the allegations of the complaint, the school district has outstanding thousands of dollars of warrants, issued for teachers' salaries and other current expenses, attached to notes given for this borrowed money, and while this is indebtedness of the district, it is not bonded indebtedness, and there is therefore no authority to issue bonds to cover those debts, for the reason that the

district has now outstanding bonds in excess of seven per cent of the assessed value of the property of the district."

See also *Arkansas County Road Imp. Dist. No. 5* v. *Taylor*, 185 Ark. 293, 47 S. W. 27; *Kersh Lake Drainage Dist.* v. *State Bank & Trust Co.*, 8 Cir., 85 F. 2d 643, 644; *Trice* v. *Arkansas State Highway Commission*, 186 Ark. 100, 52 S. W. 2d 650.

None of the Arkansas or federal cases afford support for the claim that the obligation of the lien lawfully given by the District to the bondholder here may be impaired by compelling the bondholder to share its security on a parity with the holder of a subsequently issued certificate of debt long afterwards reduced to simple money judgment. The Arkansas cases in which successive bond issues have had the same security pledged for their payment are not relevant here, no pledge having been given for these certificates. *Cf. Luehrmann* v. *Drainage District*, 8 Cir., 104 F. 2d 696; *Howe* v. *Long Prairie Levee District* 187 Ark. 725, 728, 62 S. W. 2d 10; *McNear* v. *Little Red River Levee District*, 8 Cir., 293 F. 717; *Hoehler* v. *W. B. Worthen Co.*, 154 Ark. 444, 450, 243 S. W. 822.

[6] The decree herein according a lien to the intervener on a parity with the lien of the bondholder must therefore be reserved. But we do not hold that Mr. Grable was without right to intervene in the bondholder's suit. Such intervention appears to be proper under the Arkansas statutes and decisions. Pope's Digest §§ 7336, 7337; *Dickinson* v. *Mingea*, 191 Ark. 946, 88 S. W. 2d 807; *Rogers Paving Imp. Dist.* v. *Swofford*, 193 Ark. 260, 99 S. W. 2d 577. But the lien of the bondholders is and must be maintained as prior and superior, and the intervener's recovery must be subject to and in recognition of such priority.

Reversed and remanded with instruction to enter new decree in conformity herewith.

WHITAKER AND COMPANY ..... *Appellant,*

v.

SEWER IMPROVEMENT DISTRICT No. 1 OF DARDANELLE, ARKANSAS, *et al.* ..... *Appellees.*

No. 14900.

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

March 30, 1955.

(Appeal from United States District Court for the Eastern District of Arkansas; Thomas C. Trimble, C.J.)

STONE, Circuit Judge.

In the municipality of Dardanelle, Arkansas, Sewer Improvement District No. 1 was organized in 1917. In that year, the District issued sixty-five bonds of $500 each, bearing six per centum interest, and maturing annually and serially. After several years, there was default on the bonds. In 1937, the then holder of $18,300 (principal) of the bonds secured a decree in the United States Court for $28,074.01, which included past due interest. In 1939, the same holder had a further decree covering four additional bonds (total $2,000) and interest ($762.20). In 1948, these decrees were assigned to Roy A. Dickie. In 1951, Dickie filed a "Petition and Motion" seeking equitable relief which would enable him to ascertain and recover the balances due upon these decrees.[1]

Summarized, the answer pleaded that the entire amount of the benefits determined to accrue to all of the lands in the District had been paid by the respective property owners except $16,146; that plaintiff is entitled to recover this total sum, together with legal penalties and costs, from those property owners who are delinquent; that prop-

[1] All of these three actions were against the District, the District Commissioners, and the trustee under the pledge to secure payment of the bonds.

erty owners who have paid in full the betterments to their properties have the liens thereon released; that the District has no assets except the above delinquent assessments; and that there is no legal authority to levy or assess "additional betterments or taxes against the lands, current or delinquent."

A stipulation of facts was filed. The Court stated in his decree that "from and upon consideration of the stipulation of facts, the orders and decrees heretofore entered, and all matters and things before the court, and the record as herein presented over a period of fifteen years", he made certain finds.

A summation of the here pertinent findings is: that the total benefits accruing from the improvement constructed are $78,086; that these betterments have been fully levied and are liens upon the various lots and tracts in proportion to the betterments levied upon the particular tract or lot; that there remain due and unpaid betterments in the total sum of $16,146; that such sum, together with penalties and costs as fixed by law, is the entire remaining assets of the District covered by the pledge securing the bonds; that the amount due upon the judgments is $35,486.27; and that plaintiff is entitled to have such delinquent assessments, together with penalties and costs, collected by a receiver and to immediate foreclosure to enforce payment.

The body of the decree named a receiver and ordered him to proceed to collect the delinquencies and to disburse receipts as directed therein. The Court expressly reserved two questions of law for future briefing and presentation as follows:

> "1. Under the law can this court direct the assessment of additional betterments against the various lots, blocks and parcels of land lying within said district;

"2. Do the delinquent assessments in this district draw interest and if so, the date and rate from which such interest may be calculated."

Thereafter, the Court considered and determined the thus reserved matters in a "Decretal Order", the here material portions are as follows:

"1.

"That under the laws of the State of Arkansas, neither this Court nor the Commissioners of said Defendant District can direct the assessment of additional betterments against the various lots, blocks and parcels of land lying within said District.

"2.

"That the delinquent annual levy of the assessment of betterments in this District do not draw interest unless and until such times as the Commissioners of said defendant District shall have complied with Act 112 of the Acts of the General Assembly of the State of Arkansas of 1933, as amended by Act 241 of the Acts of the General Assembly of the State of Arkansas of 1937;

"That such acts are permissive legislation and not mandatory, and that the Commissioners of said defendant District have not heretofore complied therewith."

"4.

"That said Board, or the receiver herein appointed, determine and file with this Court a list of property upon which the full betterments have not been paid, and the amount of delinquent taxes upon each of the various lots, blocks and parcels of land so delinquent.

"5.

"That said Commissioners of said defendant District, after appointment, be directed to prepare and

adopt a resolution fixing, finding and declaring the amount of unpaid betterments against each particular lot, block and parcel of land now delinquent and give notice of such resolution to refund, foreclose or reassess delinquent annual levies in the manner required by law and Act 112 of 1933 as amended, during the publication of which notice of such resolution, said Commissioners and the receiver herein are directed to accept full payment of such delinquent taxes from the owner of said tract, lot or parcel of land, and upon failure so to do by such property owner, that said delinquent assessments draw interest from the final date of such notice at the rate of six per cent (6%) per annum from said date until paid, as required by the laws of the State of Arkansas, more particularly Act 112 of 1933 as amended.

"6.

"That the lien of the betterments against the various blocks, lots and parcels of land in said defendant District by reason of the original pledge of betterments upon all property which has heretofore been paid in full be by said Commissioners and said receiver cancelled as a cloud upon the title to that particular lot, block or parcel of land.

"7.

"That unless said betterments be paid in full within sixty (60) days from the termination of the notice so hereinabove ordered, that the Commissioners of said defendant District, and the receiver herein, be ordered and directed to proceed in a manner now provided by law to foreclose said delinquent assessments upon the various lots, blocks and parcels of land in said District, and to report their actions therein to this Court, and that all funds collected by said

Commissioners and the receiver be reported to this Court for further disposition."

This appeal by plaintiff is from this last decree. Appellant presents here three issues as follows:

1. The Court erred in holding additional assessments could not be levied;

2. Statutes and decisions afford ample provisions for collecting interest;

3. The Court erred for failure to direct proper steps be taken to liquidate debt.

Because of the character of these three issues, our field of consideration can be somewhat narrowed by first examining the last of these three issues. This arises from the broad general scope of that issue. Issues 1 and 2 are concerned with specific matters, being respectively additional assessments and recovery of interest on delinquent payments. This third issue is not so confined.

THE THIRD ISSUE.

[1] This issue is that, this cause having been filed on the equity side of the Court prior to the adoption of the new Rules of Civil Procedure, the Court will grant "full and complete relief."[2] The circumstance that this cause was filed before the above Rules were adopted has no bearing upon any issue in this case. Substantive rights are not determined by these Rules, which are purely adjective.

[2, 3] In the footnote 2, are quoted the equitable maxims which appellant urges as "applicable to the facts in this case." Obviously, the maxim which is, in its scope, inclusive of the two others is that "Equity will not suffer

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[2]The brief quotes, as applicable maxims of equity:

"'Equity delights to do justice and not by halves. Equity will not suffer a wrong without a remedy. Equity imputes an intention to fulfill an obligation.'"

a wrong without a remedy." The required basis for application of this maxim is the presence of a "wrong". "Wrong", as used here, does not mean a "moral duty only, unconnected with legal obligations", *Rees* v. *City of Watertown*, 19 Wall 107, 121, 22 L. Ed. 72. "A court of equity cannot, by avowing that there is a right but no remedy known to law, create a remedy in violation of law, or even without the authority of law", Id., 19 Wall at page 122, 22 L. Ed. 72; quoted in *Meyer* v. *City of Eufaula*, Okl., 10 Cir., 132 F. 2d 648, 652. What then, are the "legal obligations" due appellant, the violation of which constitutes a "wrong" giving him a right to avail himself of this maxim?

His rights must be sought in the contracts found in these bonds and the supporting pledge security. These contracts were made by an entity created by the State of Arkansas and possessing only such powers to contract and to act as are given it by that State.

Appellant's position is that the applicable Arkansas Statutes "do not provide for segregation on any property owners' share of the debt"; that these bonds are "general obligations, and under the 'Last faithful acre doctrine,' each lot or parcel of land in the District remains bound until the debt is paid." Appellant cites and quotes from several cases supporting the "doctrine" of general liability of all property for the debts of a District but all of such citations, with one exception, concern statutes of States other than Arkansas.[3] These citations are not controlling

[3] *In re Horse Heaven Irrigation Dist.*, 11 Wash. 2d 218, 118 P. 2d 972; *Roberts* v. *Richland Irrigation Dist.*, 289 U. S. 71, 53 S. Ct. 519, 77 L. Ed. 1038 (State of Washington); *Judith Basin Irrigation Dist.* v. *Malott*, 9 Cir., 73 F. 2d 142, 97 A. L. R. 504 (Montana); *State ex rel. Malott* v. *Board of County Commissioners*, 89 Mont. 37, 296 P. 1; *State ex rel. McGee, County Treasurer, etc.*, v. *Wilson*, 358 Mo. 1244, 220 S. W. 2d 6; *State ex rel. Douglas, etc.*, v. *Redman*, 270 Mo. 465, 194 S. W. 260; *Drainage Dist. No. 4, etc.*, v. *Murphy*, 8 Cir., 119 F. 2d 390 (Missouri).

here because they have to do with statutes of States other than Arkansas; and as to matters dependent entirely upon State law. Whether the doctrine of the "last faithful acre" is applicable in Arkansas to a District of this character is, in all essence, the same issue as presented by appellant under his first contention that additional assessments may be made to pay this debt.

The only Arkansas decision cited in support of this third issue is *Benton* v. *Nowlin*, 187 Ark. 738, 62 S. W. 2d 16. This cited case is useful only in connection with the second issue here which is concerned with the issue of interest.

The net result as to this third issue is that it poses nothing not already included in and covered by the two other issues, which are Betterments and Interest.

BETTERMENTS.

The decree now appealed determined: that, under the laws of the State of Arkansas, neither the Court nor the Commissioners of the District could "direct the assessment of additional betterments against the various lots, blocks and parcels of land lying within said District;" and that the lien of betterments "by reason of the original pledge" therefor upon all land where the benefits thereon had been paid in full should be cancelled as a cloud upon the title of such land. These decretal provisions present the issue as to whether assessment of benefits beyond those set out in the original assessment thereof can be made to pay this judgment due plaintiff-appellant. It is clear that authority for such additional assessments must be found only in the laws—constitution, statutes and judicial decisions—of the State.

The 1874 Constitution of Arkansas, Article 19, § 27, expressly empowers the General Assembly to grant author-

ity to towns and cities to make assessments for local improvements "but such assessments shall be [made] ad valorem and uniform."

As to statutes. Apparently, the first general statute passed under this constitutional provision was the Act 84 of March 22, 1881. That Act provided that such assessments should be measured by percentages of the value of the various tracts within the District as such values were set forth in the last assessment for general taxes. The amendatory Act of May 8, 1899 allowed a choice of two methods of assessments for such local improvements, to-wit, the old method or an assessment against each separate tract of land based on the benefits accruing to it from the improvement. The original assessment of benefits could be altered only because of addition to or loss of improvements upon the particular tract. Apparently, the special benefit method has entirely replaced all others.

[4] As to judicial decisions. The case of *Ahearn* v. *Board of Improvement Dist. No. 3 of Texarkana*, 69 Ark. 68, 61 S. W. 575, seems to be the initial case holding that an assessment for local improvements in a city complied with the above constitutional requirement where the assessment was based upon particular benefits to the several tracts within the District. Subsequently, a long line of Arkansas decisions has firmly established the doctrine that the only theory upon which an assessment can be made, under the State Constitution, is that a special benefit—meaning increase of value—will result to the particular tract because of the improvement. *Kelley Trust Co.* v. *Paving Dist., etc.*, 184 Ark. 408, 43 S. W. 2d 71, 73. To assess a tract in excess of such benefits violates the Constitutional prohibition as an attempt to take private property for a public purpose without just compensation there-

for, *Kelley Trust Co.* v. *Paving Imp. Dist., etc.*, 184 Ark. 397, 47 S. W. 2d 569, 570.[4]

[5] The State statutes prescribe the manner and the time limits for testing the validity of assessments of benefits—as a whole or as to a particular tract of land within a district organized in a city or town, *Kirst* v. *Street Imp. Dist., etc.*, 86 Ark. 1, 109 S. W. 526. We need not notice such procedures beyond stating that, unless such are timely made use of, the original assessment of benefits becomes final except for annual readjustments confined to changes in improvements upon the land occurring after the original assessment of benefits, *Street Imp. Dist., etc.*, v. *Goslee*, 183 Ark. 539, 36 S. W. 2d 960; *Johnston* v. *Conway*, *supra*.

[6] The Arkansas law sustains the position of appellees that no assessment of benefits can be levied by them beyond those set out in the original assessment therefor. This is the determination which the Court below made is disposing of the first of the questions reserved in its decree of March 2, 1953 as answered in the later decree now before us.

INTEREST.

This issue involves the second of the matters reserved in the decree of March 2, 1953, and is

> "2. Do the delinquent assessments in this district draw interest and if so, the date and rate from which such interest may be calculated."

In the decree (June 16, 1953) now appealed, the Court determined this issue as follows: that the delinquent annual levy of assessment of benefits did not draw interest

[4] There have been a multitude of Arkansas cases determining various aspects of the matters treated therein in this paragraph of this opinion. The principles are so firmly established that we limit our citations. The case of *Johnston* v. *Conway*, 151 Ark. 398, 237 S. W. 80 may be added because of the similarity of the fact situation to that before us.

"unless and until" the Commissioners of the District complied with Act 112 of 1933 as amended by Act 241 of 1937; that such Acts were permissive instead of mandatory and the Commissioners had not "heretofore complied therewith"; that the Commissioners shall adopt a resolution (1) fixing the amount of "unpaid betterments" as to each particular piece of land, and (2) giving notice of a refunding proceeding under said Act 112 as amended; that during publication of such notice, full payment of such delinquent taxes on any piece of land should be accepted; that delinquencies not so paid should bear six per centum interest from the final publication date until paid "as required by the laws of the State of Arkansas, more particularly Act 112 of 1933 as amended"; that foreclosure proceedings should be brought on all such delinquent assessments not paid within sixty days after the above final publication date.

The net results of these provisions of this decree were: (1) to excuse from all further liability (including payments of any interest) all land whereon the assessed benefits had been fully paid before the final date of publication of the above notice; (2) to place an interest charge of six per centum upon all unpaid assessments of benefits to run from the final publication date until such separate assessment was fully paid; and (3) to foreclose upon all land delinquent more than sixty days after such final publication date. In short, the only collectable interest was the 6% to be levied on betterment assessments delinquent after the publication of notice. This plan was designed to put in force the Court's determination that there could be no interest charges on delinquent annual assessments except such as were delinquent at the time a refunding proceeding under Act 112 of 1933 as amended became operative.

[7] The parties agree that whether assessments of benefits for local improvement districts bear interest is

entirely controlled by statutes which must " 'expressly or impliedly' " authorize such.[5] Also, there seems to be no dispute that when the right to exact interest is allowed under Arkansas statutes it is confined to deferred (instalment) payments and is regarded as a permissible additional betterment arising to the advantage to the landowner from the use of money borrowed to construct the improvement.[6]

In examining the Arkansas statutes and decisions as to interest upon securities issued by a local improvement district, a difference must be noted between the law applicable to municipal districts (such as paving or sewer) and other districts (such as drainage or levee). As to the latter, the legislative Acts frequently provided that a property owner might, within a definitely limited period after organization of such district, pay his entire assessment of benefits but that where he did not do this the unpaid amount or balance after the first partial payment should be by annual instalment payments which (if securities were issued by the district) should bear interest. It was not until 1933 that an Act was passed which applied also to *municipal* districts in a manner to be hereinafter described. This Act is Act No. 112 of 1933 now incorporated substantially as Title 20-205, 20-206 and 20-207 of the 1947 Statutes Annotated.

This Act No. 112 is purely a grant of power to municipal improvement districts to refund existing bonded indebtedness. It arose from the financial and economic conditions brought about by the depression of 1929 and immediately following years.

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[5]See *Turner* v. *Ederington*, 170 Ark. 1155, 282 S. W. 1000; *Pfeiffer* v. *Bertig*, 141 Ark. 531, 217 S. W. 791, 792.

[6]*Kersh Lake Drainage Dist.* v. *Johnson*, 203 Ark. 315, 157 S. W. 2d 39, 40, and numerous cases there cited, including *Benton* v. *Nowlin*, 187 Ark. 738, 62 S. W. 2d 16, 19.

Section 1 of that Act provided that such districts "shall have power" to refund their outstanding indebtedness, including bonded indebtedness and accrued interest thereon, by the issue of new bonds having prescribed limitations as to interest and duration.

Section 2 prescribed that "In order to provide for the additional interest requirement of such refunding bonds * * *, the improvement district issuing refunding bonds may follow any one of the alternative procedures hereinafter outlined and designated as (a), and (b) to-wit:" then follows the method set forth in "(a)", and the method set forth in "(b)".

In so far as here pertinent, it is useful to examine these two methods only to a limited extent. Generally, each provides that the procedure thereunder shall be initiated by resolution of the Board of Commissioners of the district; that such resolution shall determine the "entire balance unpaid on the date of the refunding bonds of the assessment of benefits against each lot, block and parcel of land and railroad track and right of way" which shall bear interest at not exceeding 6%; that such interest shall be levied annually upon the balance of unpaid benefits; and that such levy of interest need not be collected "until it is necessary to do so to avoid exceeding the total amount of benefits." The cardinal difference between "(a)" and "(b)" is that under "(a)" the existing unpaid balance of betterments is finally determined to be the particular and total benefits as a basis for refunding; while under "(b)" an opportunity for reassessment of benefits is afforded any property owner in the district.[7]

[7]This opportunity is afforded by a publication of notice giving an appeal within ten days to the City or Town Council to have the assessment revised and, within thirty, to the Chancery Court of the County for revision. If no such appeals are taken, the assessment of benefits as determined by the Board becomes final except for annual revisions based

Section 3 of the Act sets forth the form of the refunding bonds and declares that such bond holders shall have all the rights of security and remedies for enforcement thereof as provided for the original bonds.

[8] This Act No. 112 of 1933 was not a mandatory Act enacted to compel all municipal districts. It was purely a grant of power which was made available to such municipal districts as desired to make use thereof.

An important consideration in any application of this power was necessarily the matter of interest in connection with the refunding arrangement. Up to the passage of this Act, the Arkansas law had expressly allowed interest upon deferred payment of benefits as to improvement districts *other than* municipal districts—such as levee or drainage districts—but had never authorized such interest on deferred payments of municipal districts.

Section 2 of the Act (now 20-206 of the 1947 Statutes Annotated) is devoted to this matter of interest on refunding bonds[8] and is quite different from district law covering non-municipal districts such as levee or drainage districts. Those differences are vital here. By Section 2, interest on refunding bonds is to be levied only on "the entire balance unpaid on the date of the refunding bonds of the assessment of benefits against each lot, block and parcel of land and railroad track and right-of-way * * * from the date of the refunding bonds until paid * * *." Such provisions clearly limit such interest to the basis of unpaid benefit assessments which are such at the date of the refunding bonds.

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on increased or decreased value of improvements on the tract. etc., having unpaid benefit assessments. In "(a)", the amount of unpaid benefits as determined by the Board is not subject to reexamination.

[8]While this section included also "the expense incurred in connection with the issuance of such refunding bonds." that provision, although necessary, was a comparatively trivial consideration. See *Benton* v. *Nowlin*, 187 Ark. 738, 62 S. W. 2d 16. at page 20.

The contentions of appellant are (1) that less than $4,436 of the original assessment of benefits has been applied actually to the principal of the bonds or to construction of the improvement, thus "leaving in excess of $30,836 [thereof] available for collection and application [on the judgments], plus interest thereon for the length of time that will be required to liquidate and, plus all costs herein accrued"; and (2) seemingly[9] that interest on deferred instalment payments of benefits may be applied retroactively before the issue of refunding bonds.

(1) It is true that most of the collections of benefits have been applied to bond interest instead of bond principal. However, the argument and conclusion drawn therefrom by appellant are unsound. They result from confusion of interest upon the bonds with interest upon deferred instalment payments of benefits. Prior to Act 112 no municipal district had lawful authority to impose interest upon such deferred payments. Consequently, there could be no such apportionment of benefit payments between interest and principal of bond payments which would reduce the amount of payments of originally assessed benefits.

[9] (2) Section 2 of Act 112 expressly negatives any retroactive effect or application of interest on instalment payments of benefits. That Act is definitely prospective in respect to such character of interest. It makes interest on such refunding bonds payable only upon the "entire balance unpaid on the date of the refunding bonds of the assessment of benefits" against each piece of land; and it makes such interest payable only "from the date of the refunding bonds".

[9]We state this contention "(2)" as being "seemingly" made because such position would apparently follow from some of the cases cited by appellant.

Appellant relies upon three Arkansas cases[10] as supporting his position. The two Greer cases are different stages in a *drainage* district litigation. They have no application to the legal situation before us. The Benton case involved the constitutionality of this Act No. 112—particularly Section 2(b) thereof. The suit was to enjoin the District Commissioners from proceeding with a refunding plan. The bases of the suit were that the allowance of interest on benefit instalments unpaid on the date of the proposed refunding bonds and the provision for payment of the expenses of refunding were invalid because they increased the amount beyond that of the original assessment of benefits.

Therein, the Supreme Court of Arkansas, as to a city street improvement district, held *inter alia*: that benefit assessments must be based on and cannot exceed the value of special benefits to the property taxed therefor; that interest on payment of deferred benefit instalments, where authorized by statute, is not part of the original benefit assessment and does not increase such; that such interest may be legislatively authorized even after the original assessments have been made and the improvement finished; and that legislation may authorize municipal district commissioners to declare benefit instalments unpaid on date of refunding bonds to be the assessment of benefits for refunding purposes.

In so far as here directly pertinent, the Benton case sustains the position of appellees. This it does in upholding the provisions of Act No. 112 in respect to the balance of the unpaid original benefits being the source "from which the bonds as refunded are to be paid", 62 S. W. 2d at page 19; and in respect to allowing interest upon such deferred instalments as thus arrived at in Section 2.

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[10] *Greer* v. *Wine*, 219 Ark. 425, 243 S. W. 2d 43; *Greer* v. *Blocker*, 218 Ark. 259, 236 S. W. 2d 68; and *Benton* v. *Nowlin*, 187 Ark. 738, 62 S. W. 2d 16.

CONCLUSION.

[10] Our conclusions upon the entire appeal before us are: that appellant has failed to sustain any of the three issues presented here; that the order or decree appealed from is correct; and that the order or decree should be and it is

Affirmed.

APPENDIX D—ORDERS AND JUDGMENTS IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

WHITAKER AND COMPANY ..... *Plaintiff,*

v. No. 2856 In Equity

SEWER IMPROVEMENT DISTRICT No. 1 OF DARDANELLE, ARKANSAS, ET AL ..... *Defendants.*

ORDER

Now on this day comes on for hearing the Report and Motion of James K. Young, Receiver, for advice and direction, and the Court being well and sufficiently advised in the premises doth find:

That said Report be accepted and the Motion granted.

IT IS THEREFORE by the Court considered, ordered and adjudged that the Report of the Receiver be accepted.

It is further considered, ordered and adjudged that the Motion of said Receiver be granted.

It is further ordered and adjudged that said Receiver and Commissioners be authorized, empowered and directed to employ Joe Goodier and Robert J. White, members of the Bar of said County and District, as attorneys for said District and its Receiver.

It is further ordered that said Receiver and Commissioners be authorized and empowered to petition the Chancery Court for the Dardanelle District of Yell County, Arkansas, for an approval of the foreclosure sale heretofore granted and for the issuance of a deed to said District for the property therein sold and unredeemed.

It is further ordered that during the pendency of said Petition and Motion that the Receiver and Commissioners

be authorized and empowered to permit the redemption of said property by the respective owners in accordance with the authority heretofore granted.

It is further ordered that said Receiver and Commissioners proceed as expeditiously as practicable in the foreclosure in the Chancery Court for the Dardanelle District of Yell County, Arkansas, all unpaid betterments upon the various lots, blocks and tracts of land heretofore unforeclosed.

This 24th day of January, 1956.

See Petition to Correct by Whitaker & Co., and Stipulation of 3-15-56 and Nunc Pro Tunc Order 3-22-56.

THOMAS C. TRIMBLE, Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

WHITAKER AND COMPANY ..... *Plaintiff,*

v. No. 2856 In Equity

SEWER IMPROVEMENT DISTRICT No. 1 OF DARDANELLE, ARKANSAS, ET AL ..... *Defendants.*

ORDER

Now on this day comes on for consideration and hearing the Petition of plaintiff asking for clarification of the Order of this Court in this cause dated January 24, 1956. The Court after being well and sufficiently advised as to the law and facts in the premises, finds:

That by its Order of January 24, 1956, the Court meant that the Receivers and Commissioners be authorized to permit redemption of the lands foreclosed on only provided that the redemption was made within the period provided by law; that in said Chancery foreclosure suit in Yell

County, Arkansas, the period of redemption expired on December 1, 1946; that the Order of January 24, 1956, was not intended to allow redemption where the same was not allowed by law and would have the effect of impairing the assets of the District and the Judgment of plaintiff in this cause.

IT IS THEREFORE by the Court considered, ordered and decreed that the Order of this Court dated January 24, 1956, is hereby clarified in accordance with the above findings and that the Receiver and Commissioners be authorized to permit redemption only to property where the redemption is made within the five year period from sale as required by the laws of the State of Arkansas.

Witness my hand this 22 day of March, 1956.

/s/ THOMAS C. TRIMBLE, Judge.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

WHITAKER AND COMPANY.....*Plaintiff,*

v. No. 2856 In Equity

SEWER IMPROVEMENT DISTRICT NO. 1 OF DARDANELLE, ARKANSAS: HAROLD SNYDER, LEWIS A. WEBB AND DAN KEENAN AS SUC. COM. OF SAID DIST.....*Defendants.*

ORDER

(Filed Sept. 25, 1956, Grady Miller, Clerk)

1. Now on this 24th day of September, 1956, comes on for a decision the Petition for advice and direction of James K. Young, Receiver of Sewer Improvement District No. 1 of Dardanelle, Arkansas, along with a Petition of the Commissioners of said District asking that said receiver-

ship be terminated. Also involved is the Petition of Whitaker and Company and Roy A. Dickie asking that Parker Parker be allowed no further fees either as attorney for Whitaker & Company or as attorney for D. A. Love, Receiver, and other Receivers appointed by this Court. These issues were argued orally before the Court on April 26, 1956, and written briefs submitted thereafter. Further oral argument was had on September 10, 1956. Whitaker & Company and Roy A. Dickie were present by Mr. S. L. White and Mr. J. H. Evans, their attorneys; Mr. James K. Young, Receiver, was present in person and by his attorney, Mr. Robert J. White; Mr. Harold Snyder and Dr. Lewis A. Webb, two of the Commissioners of said District were present in person at the April 26 hearing, but the third Commissioner, Mr. Dan Keenan, was absent; none of said Commissioners were present at the September 10 hearing but were present at all times by their attorney, Mr. Charles Gardner; Mr. Parker Parker was present in person and by his attorney, Mr. John Shamburger. The cause was presented to the Court on Petitions of the various parties, notice of the time and place of the hearings, oral arguments and statements of counsel, written briefs, the previous lengthy record in the case and other matters and things before the Court, from all of which, after being well and sufficiently advised as to the law and facts in the premises, the Court finds:

2. That on March 2, 1953, this Court appointed James K. Young as Receiver of Sewer Improvement District No. 1 of Dardanelle, Arkansas; that he is still serving in this capacity; that during this time he has made collections and taken other action in an attempt to wind up the affairs of the District; that during all this time the various receivers have made collections, brought foreclosure suits in the State Courts, issued deeds and other evidences of full payment as to various tracts, made payments of the money collected to

the proper parties and paying agents as directed by this Court and in general did and performed all acts which the Commissioners could have done under the law; that the various Receivers made periodic reports to this Court accounting for all monies collected.

3. The Court further finds that Act 79 of 1933 of the General Assembly of Arkansas which appears as Section 20-1120 of the 1947 Arkansas Statutes Annotated prohibits the appointment of receivers in improvement districts; that it therefore appears that the appointments of the various receivers were without authority; that this was not called to the attention of this Court until recently; that the various receivers have performed a valuable service during this long period of time; that many, many acts and things have been done by the receivers and it would be impossible to go back and undo what has been done, and if it were possible, it would be inequitable to many innocent people who have acquired vested property rights in reliance on the acts of said receivers; that all executed acts of the various receivers should be declared valid acts; that determination of the validity of the foreclosure suits filed by the various receivers in the State Courts should be left to the Courts in which such suits were filed; that James K. Young should be discharged as receiver and that he should be required to turn over to the Commissioners of said District within 30 days all receipts, books and other records pertaining to said District which are in his possession; that the said James K. Young should deliver all monies of said District in his possession, including certain sums to which Parker Parker has alleged a claim, to the Union National Bank of Little Rock, Arkansas, which is the paying agent in this cause and that said Bank should continue to act in this capacity; that said Bank should not disburse any further money which is now in its possession or which may come into its possession in the future as paying agent without a

specific Order of this Court and that all previous Orders as to disbursement should be rescinded; that the said James K. Young should file a final account with this Court within 30 days.

4. The Court further finds that the Commissioners of said District, namely, Harold Snyder, Lewis A. Webb and Dan Keenan, should proceed in good faith and with all reasonable speed to liquidate the assets of said District and wind up the affairs of said District to the end that the judgments in this cause may be satisfied, or so much thereof as possible; that all monies of said District coming into the hands of said Commissioners should be immediately deposited with the Union National Bank of Little Rock, Arkansas, as paying agent of this Court; that all other questions now before the Court should be reserved for future determination; that all monies to which Parker Parker has an alleged claim, either in the foreclosure suits filed in the State Courts or in this Court, should be deposited with said paying agent and his right thereto determined by this Court at a later date.

5. It is therefore by the Court considered, ordered and decreed that James K. Young be, and he is hereby discharged as Receiver of Sewer Improvement District No. 1 of Dardanelle, Arkansas, and he is hereby directed to deliver all records pertaining to said District which are in his possession to the Commissioners of said District within 30 days; that the said James K. Young is hereby directed within 30 days to deliver all monies of said District in his possession, including certain sums to which Parker Parker has alleged a claim, to the Union National Bank of Little Rock, Arkansas, as paying agent of this Court, and he is further directed to file a final account with this Court within 30 days.

6. It is further ordered and declared by the Court that all executed acts of James K. Young and previous

receivers are and were valid acts and that the determination of the validity of the foreclosure suits filed by the various receivers in the State Courts should be left to the Courts in which such suits were filed.

7. It is further ordered by the Court that the Union National Bank of Little Rock, Arkansas, continue to act as paying agent of this Court for this cause and that all previous orders of this Court to said Bank relative to disbursement of funds be and they are hereby cancelled and set aside and said Bank is ordered to disburse no further funds except on specific orders of this Court.

8. It is further ordered by the Court that the Commissioners of said District, namely, Harold Snyder, Lewis A. Webb and Dan Keenan, proceed in good faith and with all reasonable speed to liquidate the assets of said District and wind up the affairs of said District to the end that the judgments in this cause may be satisfied, or so much thereof as possible; said Commissioners are further ordered to deposit all monies of said District which may hereafter come into their hands with the Union National Bank of Little Rock, Arkansas, as paying agent of the Court in this cause, to include all monies to which Parker Parker has an alleged claim, either in the foreclosure suits filed in the State Courts or in this Court.

9. It is further ordered by the Court that all other questions now before it, including the matter of Parker Parker's attorney fees in this cause and in the foreclosure suits in the State Courts, be postponed and decided at some future time.

10. And the Court retains jurisdiction of this cause to render such other and further orders as may become necessary or justified in the premises.

Date, September 24, 1956.

/s/ THOMAS C. TRIMBLE, Judge.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

WHITAKER & COMPANY ..... *Plaintiff,*

v. Equity No. 2856

SEWER IMPROVEMENT DISTRICT No. 1
OF DARDANELLE, ARKANSAS, ET AL ..... *Defendants.*

ORDER

On this day the Court having considered the Petition of plaintiff for Review of Case and for Rule on Defendant to Show Cause, and being well and sufficiently advised, and having filed herein as a memorandum in connection with said Petition a signed copy of its letter of even date herewith, adressed to counsel on both sides,

It is ORDERED that said Petition be, and the same hereby is, denied.

This the 8th day of December, 1960.

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United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

WHITAKER & COMPANY ..... *Plaintiff*

vs. Equity No. 2856

SEWER IMPROVEMENT DISTRICT No. 1
OF DARDANELLE, ARKANSAS, ET AL. ..... *Defendants*

MEMORANDUM AND FINAL ORDER

Reference is made to the Court's Memorandum and Order dated January 9, 1962, and filed herein on January 10, 1962, to the Court's Supplemental Order dated and

filed herein on February 2, 1962, to the Order of Disbursement signed by the Court and entered and filed herein on March 17, 1962, and to the directive contained in the Court's letter to counsel dated March 17, 1962, a copy of which has been filed as part of the record in the case.

The Orders of January 9 and February 2, taken together, fixed the rights of Parker Parker to attorney's fees for services in this cause, upheld the assignment of the original and supplemental Decrees in this cause to Roy A. Dickie, adjudged the beneficial interest in said Decree and Supplemental Decree and in all moneys collected thereunder was vested in Parker Parker to the extent of .006 per cent, in Mrs. Laura Parker to the extent of .002 per cent, in Warren McGuire, as assignee of A. S. McCray, to the extent of .084 per cent, the balance of such beneficial interest being vested in the said Roy A. Dickie.

In the Order of January 9 the parties were directed to undertake to agree upon an Order disbursing funds then at hand and in the possession of the Union National Bank, Little Rock, Arkansas, and fixing a schedule for the disbursement of any collections that might be effected in the future. However, the Order of February 2, 1962, suspended the portion of the January 9 Order just mentioned until Roy A. Dickie should account for all moneys which had come into his hands as assignee of the Whitaker & Co. judgments since 1948 and should show what sums he had disbursed to Parker Parker, Mrs. Laura Parker, and Warren McGuire, or the latter's assignor, and to show further what sums, if any, were due from the said Dickie to the other parties just mentioned.

On March 17, 1962, on application of Parker Parker the Court entered an Order disbursing to Parker Parker the sum of $1,572.87 then in the hands of the Union National Bank. In connection with that Order the Court ad-

dressed a joint letter to Mr. Parker and to Mr. S. L. White, attorney for Mr. Dickie, and in that letter stated:

> "In signing this Order it is my understanding that the payment of the sum of $1,572.87 will be in complete satisfaction of Mr. Parker's claim for attorney's fee and will extinguish that claim, at least as far as all collections of the District up to this time are concerned."

In that letter the Court also called attention to the fact that Mr. Dickie had not filed the accounting called for by the Order of February 2, and directed that he account as soon as possible.

On March 29, 1962, Mr. Dickie filed an affidavit showing that the only funds that have ever come into his hands as assignee of the Whitaker & Co. judgments is the sum of $208.28 which he received on or about July 11, 1949, and stating that he is prepared to disburse that sum pursuant to Order of this Court. The Court is advised that a copy of this affidavit has been furnished to the other interested parties.

Out of that sum Mr. Dickie should pay ten per cent to Parker Parker as attorney's fee. The balance is to be disposed of as follows: .006 per cent to Parker Parker as a bondholder; .002 per cent to Mrs. Laura Parker as a bondholder; .084 per cent to Warren McGuire as a bondholder; the remainder to be retained by Mr. Dickie.

On the same day, March 29, 1962, the Bank filed a statement of its collections and disbursements as paying agent of the defendant District. The Court is advised that copies of that statement have been supplied to other interested parties. The statement covers the period from March 5, 1954, to March 21, 1962. It shows total receipts of $8,598.97 and total disbursements to all interested parties amounting to $7,982.84, including the $1,572.87 disbursed to Parker

Parker pursuant to the Court's Order of March 17, 1962. The final balance on hand shown by the statement is $616.13.

The statement reflects that the last receipt of funds by the Bank was on August 21, 1959, and was in the sum of $1,269.44. On April 19, 1960, there was paid over to Richard Mobley, attorney for Warren McGuire, the sum of $442.91. Hence, as the Court construes the Bank's statement, the $616.13 remaining in the Bank's hands is the property of Mr. Dickie, Mr. Parker Parker, and Mrs. Laura Parker as beneficial owners of the Whitaker & Co. judgments. Mr. Parker is entitled to .006 per cent of that fund, and Mrs. Parker is entitled to .002 per cent. The balance belongs to Mr. Dickie.

No objections or exceptions have been filed with respect to the affidavit of Mr. Dickie or to the Bank's statement, and the Court accepts that affidavit and the Bank's statement as a full and complete account of all collections up to this time. If there are any future collections, 10 per cent thereof should be paid to Mr. Parker Parker as attorney's fee. The balance should be disbursed as follows: .084 per cent to Warren McGuire, .006 per cent to Park Parker, .002 per cent to Mrs. Laura Parker, and the remainder to Roy A. Dickie.

It is, or at least may be, desirable to keep the account in the Union National Bank open for the time being, and to that end the Bank is authorized to retain in the account such amount up to $25 as it may deem necessary to prevent the account becoming dormant. The balance is to be disbursed to Parker Parker, Mrs. Laura Parker, and S. L. White, as attorney in fact for Mr. Dickie. As indicated, Mr. McGuire has no claim on the money now on deposit with the Bank.

All of the issues between the parties have now been adjudicated, and the case should be closed, subject to the right of any affected party to appeal from any Order adversely affecting him.

It is, therefore, CONSIDERED, ORDERED, ADJUDGED, and DECREED:

1. That Parker Parker's claim for attorney's fee on account of collections made up to this time has been paid in full, except that he is entitled to receive from Roy A. Dickie the sum of $20.83 as attorney's fee out of the sum of $208.28 now in Dickie's hands.

2. That the affidavit of Roy A. Dickie filed herein on March 29, 1962, be, and the same hereby is, accepted, approved, and confirmed, and that the Court adjudges that the said Dickie owes nothing to any other party in interest herein, except that out of the $187.45 which will remain in Dickie's hands after paying Parker Parker the $20.83 referred to in the preceding paragraph hereof .006 per cent is to be paid to Parker Parker as a bondholder, .002 per cent is to be paid to Mrs. Laura Parker as a bondholder, and .084 per cent is to be paid to Warren McGuire as assignee of A. S. McCray, a bondholder, the balance to be retained by Dickie.

3. That the statement of the Union National Bank, Little Rock, Arkansas, filed herein on March 29, 1962, be, and it hereby is, approved and confirmed; that the balance of $616.13 now in the hands of the Bank belongs to Roy A. Dickie, Parker Parker, and Mrs. Laura Parker as bondholders; that the Bank is authorized to retain in its hands such sum, up to $25, as may be necessary to keep the account open, the balance is to be disbursed .006 per cent to Parker Parker, .002 per cent to Mrs. Laura Parker, and the remainder to S. L. White, as attorney in fact for Roy A. Dickie.

4. That any future collections effected by the Commissioners of the defendant District are to be paid over to the Bank as heretofore; that after the Bank deducts its charges and commissions, the net collections are to be disbursed as follows: Parker Parker is to receive 10 per cent as attorney's fee; .006 per cent of the balance is to be paid to Parker Parker as a bondholder; .002 per cent of the balance is to be paid to Mrs. Laura Parker as a bondholder; .084 per cent of the balance is to be paid over to Warren McGuire as assignee of A. S. McCray, and the balance is to be paid over to Roy A. Dickie or to S. L. White, his attorney in fact. The Bank is authorized to make such disbursements without further Order of this Court.

Dated this 27th day of April, 1962.

/s/ J. Smith Henley

United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Whitaker & Company ..... *Plaintiff*

v. Equity No. 2856

Sewer Improvement District No. 1,
of Dardanelle, Arkansas, et al., ... *Defendants*

AMENDMENT TO MEMORANDUM AND FINAL ORDER DATED APRIL 27, 1962

It has been made to appear to the Court that the Memorandum and Final Order filed herein April 27, 1962, is in error in that under said Order there would be disbursed out of the $616.13 in the hands of the Bank to Parker Parker as a bondholder the sum of $3.70 and to Mrs. Laura Parker as a bondholder the sum of $1.23, whereas Parker Parker should receive out of the said sum of $616.13 the

sum of $31.93 and Mrs. Laura Parker should receive the sum of $10.64. It has been made to appear further to the Court that the Union National Bank has made disbursements under the Memorandum and Order of April 27, 1962, but that the checks payable to Parker Parker and Mrs. Laura Parker have been returned to the Bank. In order for the error to be corrected, Roy A. Dickie or his attorney, S. L. White, should deposit in the relevant account in the Bank the sum of $37.64. The Bank should then destroy the original checks to Parker Parker and to Mrs. Laura Parker, and should issue a new check to Parker Parker in the sum of $31.93 and a new check to Mrs. Laura Parker in the sum of $10.64.

IT IS SO ORDERED.

Dated this 8th day of May, 1962.

Paid 5-9-1962; Check No. 2820—$37.88.

/s/ J. SMITH HENLEY

United States District Judge

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

No. 17,090. September Term, 1963.

ROY A. DICKIE, ASSIGNEE OF WHITAKER & COMPANY, INC. ..... *Appellant,*

v.

SEWER IMPROVEMENT DISTRICT NO. 1 OF DARDANELLE, ARKANSAS; DAN KEENAN, HAROLD SNYDER AND LEWIS A. WEBB, SUCCESSOR COMMISSIONERS OF SAID DISTRICT.

Appeal from the United States District Court for the Eastern District of Arkansas.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the District Court appealed from in this cause be, and the same is hereby, affirmed.

March 2, 1964

Order entered in accordance with Opinion:

ROBERT C. TUCKER
Clerk, U. S. Court of Appeals
for the Eighth Circuit.